No. 89-51

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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

MARY A. HOHE, *et al.*,
and ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

ROBERT P. CASEY, GOVERNOR,
COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 1989

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QUESTIONS PRESENTED

1. Can nonunion public employees be denied a preliminary injunction against compulsory collection of union fees solely on the ground that irreparable injury, inherent in a first-amendment violation, is completely avoided by escrow, even if other safeguards required by the first amendment are not provided?

2. Whether the collection scheme here fails to meet the first-amendment requirements set out in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), because:

(a) automatic deductions began within days of notice to nonmembers of their basis and before the opportunity to object passed, and fees can be spent before the objection period ends;

(b) the fee and explanation of it to nonmembers were in part based on a presumption, not actual expenses, and were not independently verified;

(c) the explanation did not enable nonmembers intelligently to gauge the propriety of the calculations; and/or

(d) the standards for chargeable costs are arbitrary and overly broad.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Timothy L. Cassel, Joseph F. Clover III, Vickie M. Clover, Steven A. Ebersole, Linda R. Garman, Arlene J. Hetzel, Carol D. Hench, Francis D. M. Hill, Jr., Mark A. Kantorczyk, Nancy Lebo, Gerald J. Maher, Jeri Morris, Jack H. Reefer, Jr., and Thompson M. Young II.

Respondents: Joseph L. Zazyczny, Secretary of Administration, and G. Davis Greene, Jr., Treasurer, of the Commonwealth of Pennsylvania; the Commonwealth of Pennsylvania; and Council 13, American Federation of State, County & Municipal Employees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Mary A. Hohe, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on February 16, 1989.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") A, *infra*, 1a-12a) is reported at 868 F.2d 69. The district court's temporary restraining order (App. B, *infra*, 13a-15a) is reported at 704 F. Supp. 581; its opinion and order denying a preliminary injunction (App. C, *infra*, 16a-32a), at 695 F. Supp. 814.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 33a-34a) was entered on February 16, 1989. On April 28, 1989, Associate Justice William J. Brennan, Jr., extended the time within which to file a petition for a writ of certiorari to and including Sunday, July 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution says in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statute involved is Pennsylvania Act No. 84 of 1988, 1988 Pa. Legis. Serv. 348 (71 Pa. Stat. Ann. § 575) (Purdon) ("Act 84"). Its pertinent parts are reprinted in Appendix E, *infra*, 35a-41a. This case also involves a "Notice to All Non-Union Member Fair Share Fee Payers" promulgated pursuant to Act 84, reprinted in Appendix F, *infra*, 42a-60a.

STATEMENT OF THE CASE

This is a class action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, brought by fifteen nonunion employees of the Commonwealth of Pennsylvania against their exclusive bargaining representative and officials of the Commonwealth who entered into a collective bargaining agreement that compels payment of a "fair share fee" to that agent, Council 13 of the American Federation of State, County and Municipal Employees ("AFSCME").[1] It seeks injunctive, declaratory, and other relief on the ground that the agreement, the statute authorizing it (Act 84), and the procedures implemented by the union pursuant to the agreement and statute fail to provide some of the first-amendment procedural safeguards enunciated by this Court in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). The district court therefore had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

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1 Although not reflected in the record on appeal, an amended complaint dropping the Commonwealth as a defendant was filed after the appeal was docketed in the Third Circuit. The action was brought against the state officials in both their official and personal capacities. Complaint ¶ 9.

Act 84 was enacted on July 13, 1988. On July 28, AFSCME Council 13 and the Commonwealth agreed to deduct fair share fees from the pay of all nonmembers represented by the union. Council 13 determined that the fee would be 88.55% of dues (1.5% of base salary), *i.e.*, 1.33% of a nonmember's base salary. It identified some 18,000 nonmembers from the Commonwealth's payroll records and informed the state of the names and amounts to be deducted. Council 13 also prepared a notice which it mailed to nonmembers between August 8 and 12, 1988. App. C at 16a-18a. The notice gave Council 13's explanation of how the fee was calculated and described a procedure by which nonmembers could challenge that calculation. App. F.[2]

The explanation of the calculation in the notice first states Council 13's general standard of chargeability and lists categories of chargeable and nonchargeable activities. No dollar amounts are given with those categories. The notice then contains schedules of expenses, allocated into chargeable and nonchargeable columns. Most line items in the schedules are described by object, not activity or function; there is no explanation of how expenses were allocated within individual line items. Only total expenses are listed for the portion of dues transmitted to AFSCME locals; the notice explains that a presumption was used to allocate those expenses. The notice does not include an independent certified public accountant's verification of the schedules. *Id.* at 45a-56a.

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2 Act 84 obligates the union to adopt such a procedure and give notice, but it also requires the employer to begin deductions even if the union has not done so. App. E at 38a (71 Pa. Stat. Ann. § 575(c)-(d)).

On August 16, 1988, the Commonwealth began deducting fair share fees at the rate set by Council 13. By agreement, monies deducted in one month must be remitted to the union by the end of the next. Pursuant to past practice with dues, the state did not intend to remit fair share deductions taken in August until about September 26. App. C at 18a. Challenges under Council 13's procedure for contesting the fee amount had to be postmarked no later than 45 days from the date of its notice, August 8, *i.e.*, by September 22. Upon receipt of challenges, the union escrows challengers' deductions until the decisionmaker under its procedure issues a decision; escrowed amounts, with interest, then will be distributed in accordance with the decisionmaker's ruling. App. F at 59a-60a.

The nonmembers filed their complaint on August 26, 1988, with a motion for a temporary restraining order and preliminary injunction. App. C at 18a. On August 30, the district court held that defendants' procedures for collecting fair share fees apparently do not comport with the constitutional requirements outlined in *Hudson*. Accordingly, it set a hearing and temporarily restrained further deductions. App. B at 14a-15a. However, on September 15, 1988, after the hearing, the court denied a preliminary injunction and lifted the temporary restraining order, on the ground that the claims presented on the motion either had no merit or were not properly raised in this action. App. C at 19a-32a.

A timely appeal under 28 U.S.C. § 1292(a)(1) was taken from the order denying a preliminary injunction, but on February 16, 1989, the court of appeals affirmed. The court did "not * * * intimate any opinion regarding the ultimate merits of plaintiffs' case," relying solely on the ground that plaintiffs "failed to show that they would

suffer irreparable harm absent the issuance of a preliminary injunction." App. A at 4a, 12a n.7.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION THAT IRREPARABLE HARM IS NOT CAUSED BY DENIAL OF SOME FIRST-AMENDMENT SAFEGUARDS MANDATED BY THIS COURT IN *HUDSON* CONFLICTS WITH ITS DECISION IN *ELROD* AND DECISIONS OF ANOTHER CIRCUIT AND A STATE SUPREME COURT APPLYING *HUDSON*

Hudson held that the first-amendment rights of nonunion employees are violated when a public employer deducts compulsory union fees from their wages without first establishing, or ensuring that the union has established, certain procedural safeguards required by the first amendment. The prerequisites to "collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. They also include an "appropriately justified advance reduction" to that amount which represents only "expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07, 309.

Here, the Third Circuit concluded that, where "the Union has escrowed the entire amount of all fair share fees deducted * * * until disposition of the challenges by an impartial arbitrator," a preliminary injunction is not proper, because nonmembers suffer no irreparable harm from deduction of the fees in the absence of other

procedural safeguards enunciated in *Hudson*. App. A at 8a-12a. The court did not hold that coerced deductions without *Hudson* procedural safeguards violate the first amendment only if escrow is not provided. It instead ruled that "the alleged impingement of the Union's fair share collection procedures on the plaintiffs' First Amendment rights simply fails to rise to that *level* of constitutional deprivation sufficient to show the irreparable harm necessary for the issuance of a preliminary injunction * * * ." *Id.* at 10a (emphasis added).

That decision directly conflicts with this Court's decisions in the patronage cases, *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), and with decisions of the United States Court of Appeals for the Sixth Circuit and the Supreme Court of Ohio applying *Hudson*. The basic flaw in the Third Circuit's decision is the notion that first-amendment violations, including those proscribed by *Hudson*, can be adequately remedied by damages if there is a monetary loss.

The Third Circuit had to concede that the nonmembers alleged a first-amendment violation, because *Hudson*, 475 U.S. at 309, rejected the argument "that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly, it eliminates any valid constitutional objection to the procedure." The deduction of fair share fees from nonmembers' wages, even where 100% is escrowed, violates the first amendment if the union does not *also* "provide an adequate explanation for the advance reduction of dues, *and* * * * a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309-10 (emphasis added).

Having found that first-amendment violations are alleged here, the court of appeals should have determined the likelihood that the nonmembers would prevail on the merits in order to decide whether a preliminary injunction was correctly denied. When an injunction was sought in district court, deductions of fair share fees had begun and would resume if the injunction was not issued. App. C at 18a. Thus, if the nonmembers are likely to prevail on the merits, it "is clear," as in *Elrod*, 427 U.S. at 373 (plurality opinion of Brennan, J.), "that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." No further inquiry as to irreparable harm was proper, because the "loss of First Amendment freedoms, for even minimal periods of time, *unquestionably* constitutes irreparable injury." *Id.* (emphasis added).

While acknowledging *Elrod*, App. A at 9a, the court of appeals ignored its import and held that the threatened or recurring loss of some first-amendment freedoms does not constitute irreparable injury. However, each of the propositions on which it relied is inapplicable or erroneous under *Elrod* and the Court's second patronage decision, *Branti*, or under *Hudson* itself.

The court of appeals asserted that likely success on the merits of a first-amendment claim is not enough to obtain a preliminary injunction, but that a plaintiff also "must show 'a chilling effect on free expression,'" "'purposeful unconstitutional [government] suppression of speech,'" or "the 'direct penalization, as opposed to incidental inhibition, of First Amendment rights.'" App. A at 9a, quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965), *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984), and *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983), and citing *Rushia v. Town of*

Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 112-13 (1983). However, *Dombrowski*, *Rushia*, *Wooley*, and *Lyons* were cases in which injunctions were sought against state criminal prosecutions or the administration of state criminal law.[3] As *Rushia*, 701 F.2d at 10, explained in distinguishing *Elrod*, "an injunction against a state criminal prosecution presents a different case" from a claim for relief from unconstitutional conditions placed on public employment, because of "the presence of *Younger*-type comity considerations" when state criminal law is involved. In public employment cases, "the relief sought [is] of course the kind that raises no special problem--an injunction against allegedly unconstitutional state action * * * that is not part of a criminal prosecution." *Younger v. Harris*, 401 U.S. 37, 47 n.4 (1971).

Moreover, *Goldie's Bookstore*, *Cate*, and *Wooley* do not hold that only direct suppression and penalization of the exercise of first-amendment rights constitute irreparable harm. Those are only examples of "'violations of first amendment rights [that] constitute per se irreparable injury.'" *Cate*, 707 F.2d at 1188 (quoting *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978)); *see Goldie's Bookstore*, 739 F.2d at 472.[4] *Wooley*, *Elrod*, and *Branti* establish that government *compulsion* of speech

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3 In addition, *Lyons*, 461 U.S. at 99, 111, was not a first-amendment case, and no future injury to the plaintiff was threatened. In *Rushia*, 701 F.2d at 10, the plaintiff "did not claim in the district court that his 'irreparable injury' consisted of the threat to his First Amendment right * * * ; rather, his sole claim was that the 'injury' consisted of the threatened state prosecution."

4 In *Goldie's Bookstore*, 739 F.2d at 472, the plaintiff did not allege a first-amendment infringement.

and/or association "unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373, as much as suppression and penalization. *Wooley*, 430 U.S. at 714, upheld an injunction against prosecution for refusal to display a state motto on automobile license plates, because the "right to speak and the right to refrain from speaking are complementary components" of the freedom protected by the first amendment. *Elrod*, 427 U.S. at 355-57, equated coerced assessment of a portion of a public employee's wages for political contributions with a "restraint * * * on freedoms of belief and association." *Branti*, 445 U.S. at 513, 517, held that, because "the inevitable tendency of such a system [is] to coerce employees into compromising their true beliefs," public employees need prove only that they were subjected to the system: "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance."

The court of appeals believed that this case differs from the patronage cases, because it did not recognize that in both situations public employees are "forced to choose between their adherence to a political [organization] and their continued employment." App. A at 10a. In *Elrod* and *Branti*, employees who wanted to refrain from associating with a political party had to either quit or suffer discharge. Here, employees who wish to refrain from associating with a union more than to the limited degree permitted by *Hudson* must quit, because fair share deductions are automatic. In both cases, employees must choose between forced association or loss of job. It is not significant that in one case the organization is a political party, while in the other a union, because the right to associate or not with labor unions is "entitled to full First Amendment protection." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231-32 (1977); *see*

Thomas v. Collins, 323 U.S. 516, 529-43 (1945).

A first-amendment violation, and irreparable harm, occurred in *Elrod* and *Branti* regardless of whether the party obtained and spent involuntary contributions. When an employee who refrains from associating voluntarily with the incumbent party is deprived by the state, even temporarily, of all or part of his wages through discharge or "any assessment of his salary," *Elrod*, 427 U.S. at 355, the violation and irreparable harm occur for two reasons.

First, "[s]ince the average public employee is hardly in the financial position to support his party and another * * * , the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished." *Elrod*, 427 U.S. at 355-56; *accord Branti*, 445 U.S. at 513 n.8. It is irrelevant whether the employee's salary is taken in whole, through discharge, or only part, through assessment, because this

> Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight* the inducement to the individual to forsake those rights. * * * *
>
> * * * Rights are infringed both where the government fines a person a penny for being a Republican *and where it withholds the grant of a penny* for the same reason.

Elrod, 427 U.S. at 358-59 nn.11, 13 (emphasis added); *see Hudson*, 475 U.S. at 305 & n.15. Here, the amount withheld by the state because an employee is not a union member is far more than a penny; according to Defendant Union's Exhibit 7 admitted at the preliminary injunction hearing, the average annual fair share fee is $263.16.

Second, "[c]onditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356. "Given the increasingly pervasive character of government employment, * * * the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs." *Branti*, 445 U.S. at 513 n.8. The "power to starve political opposition" is real here, where a total of $186,208 in fair share fees is deducted from more than 18,000 nonmembers in a single biweekly pay period. Defendant Union's Exhibit 7. Even if the entire amount is escrowed, almost $5 million annually is unavailable for some period of time for contribution to opponents of AFSCME Council 13's political and legislative goals.[5]

The court of appeals also contended that, because the injury alleged here included a loss of money, "restitution and/or monetary damages" is the nonmembers' only and complete remedy. App. A at 10a-11a & n.6. It forgot its own earlier recognition of "the fact that the payment of monies is involved does not automatically preclude a finding of irreparable injury." *Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273, 1280 (3d Cir. 1979). When a public employee is discharged, or a portion of his salary withheld, in violation of the first-amendment right to refrain from speech or association, "clearly more is

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5 The fit between this case and the patronage cases is even closer when it is realized that Council 13 campaigned for the election of defendant Governor Casey, because of their common legislative goals, including the agency-shop statute. *See AFSCME endorses BOB CASEY for GOVERNOR*, Council 13 AFSCME Public Employee Press, Aug./Sept. 1986, at 6; *CASEY, most Labor candidates win*, *id.*, Oct. [*sic*] 1986, at 2; *"Fair-share fee" bills set for vote*, Philadelphia Enquirer, May 26, 1987, at B-1.

involved than a simple loss of employment" or salary that can be remedied by reinstatement and/or restitution. *Burns v. Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975), *aff'd*, 427 U.S. 347 (1976). The employee has "no adequate remedy at law," *Younger*, 401 U.S. at 47 n.4, because freedom of speech and association "are not capable of money valuation," *Hague v. CIO*, 307 U.S. 496, 529 (1939) (opinion of Stone, J.).

Roberts v. Van Buren Public Schools, 731 F.2d 523, 526 (8th Cir. 1984), cited by the Third Circuit, is thus simply wrong in holding that reinstatement and back pay "would offer a complete remedy" for teachers discharged for exercising their first-amendment right of engaging in union activity. The Third Circuit was equally wrong in suggesting, on the authority of *Carey v. Piphus*, 435 U.S. 247, 256 (1978), that injunctive relief is not authorized in actions under 42 U.S.C. § 1983. App. A at 10a n.6. *Carey*, 435 U.S. at 248, only dealt with "the elements and prerequisites for recovery of damages" under 42 U.S.C. § 1983. Section 1983 by its terms also authorizes "suit in equity." In *Elrod*, 427 U.S. at 373 (quoting 509 F.2d at 1136), which was brought under 42 U.S.C. § 1983, this Court explicitly agreed with the Seventh Circuit's holding that, "'Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, * * * injunctive relief is clearly appropriate * * * .'" *See also* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 548 (1970) ("the first amendment must guarantee not simply some prospective relief, but relief fully adequate to protect first amendment interests") (cited in *Hudson*, 475 U.S. at 303 n.12).

Finally, the court of appeals said that its "holding conforms with Supreme Court precedent regarding the

appropriate remedy after fair share/agency fee collection procedures have been found inadequate." App. A at 11a. That, too, is erroneous. This Court has *never* held that an injunction is inappropriate where the *procedures* for collection of compulsory fees are constitutionally inadequate. *Abood*, *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), cited by the Third Circuit, concerned only the purposes for which fees may be collected and what remedy is appropriate to prevent excess collection. Even those cases approved enjoining at least the collection of more than a proportionate share of lawfully chargeable costs. *See Abood*, 431 U.S. at 237-40.

Only *Abood* reached any constitutional issue, and it said that "that difference surely could not justify any *lesser* relief" than suggested in *Allen* and *Street*. *Id.* at 240 (emphasis added). The Third Circuit notwithstanding, *Abood* did

> not imply * * * that the remedies described in *Street* and *Allen* would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to *exact* a service fee from nonmembers without *first* establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Id. at 244 (Stevens, J., concurring) (emphasis added) (citations omitted); *see Ellis v. Railway Clerks*, 466 U.S. 435, 443 (1984).

When the constitutional question of procedures was later reached in *Hudson*, the Court agreed with the argument proposed by Justice Stevens. *Hudson*, 475 U.S. at 305 (quoting *Abood*, 431 U.S. at 244 (Stevens, J.,

concurring)). Moreover, it held that the procedures which must be established before fees can be collected must not only avoid the risk that they will be spent for impermissible purposes, but must give the nonmember "a fair opportunity to identify the impact of [collection] on his interests and to assert a meritorious First Amendment claim." *Id.* at 302-03. Because the scheme in *Hudson* did not provide all safeguards necessary to accomplish those goals, although there was a 100% escrow, the Court declared it unconstitutional and remanded for determination of an appropriate remedy. *Id.* at 309-11. Significantly, the Court did not cite *Street*, *Allen*, or *Abood* for the principles that should guide in "fashioning a proper remedy" for the "constitutional violation," but an anti-trust action and a desegregation case. *Id.* at 309 n.22.

Subsequently, the Sixth Circuit has repeatedly mandated injunctions against collection of compulsory fees, or against discharge for nonpayment, where a procedural scheme does not fully comply with *Hudson*, even if there is 100% escrow. *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir. 1988); *Damiano v. Matish*, 830 F.2d 1363, 1366, 1368 (6th Cir. 1987) (injunction pending appeal); *Tierney v. City of Toledo*, 824 F.2d 1497, 1507 (6th Cir. 1987) (injunction against state collection suit). The Ohio Supreme Court also approved an injunction against collection of service fees in *Gibney v. Toledo Board of Education*, 40 Ohio St. 3d 152, 157-58, 532 N.E.2d 1300, 1305-06 (1988).[6] *Lowary*, in particular, squarely and directly conflicts with the decision of the court of appeals in this case.

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6 In addition, *Oliver v. Fort Wayne Education Association*, 820 F.2d 913, 915-16 (7th Cir. 1987), affirmed abstention on the ground that a state court had granted relief appropriate to protect nonmembers' first-amendment rights: an injunction against collection under procedures that do not comply with *Hudson*.

Lowary was also brought under 42 U.S.C. § 1983. The district court found it likely that the nonmember plaintiffs would prevail on the claim that their public employer and exclusive bargaining agent were collecting fair share fees without some of the procedural safeguards required by *Hudson*. Nonetheless, it denied a preliminary injunction against collection, instead ordering that the employer continue deductions and put them in an interest-bearing escrow account pending decision on the merits. *Lowary*, 854 F.2d at 133. The Sixth Circuit reversed, holding that

> once * * * the district court has found it likely that the procedures will be found, on the merits of the case, to violate *Hudson*, it constitutes an abuse of discretion for the court to allow fair-share fees to be collected even if the collected fees are placed in an escrow account.

Id. at 134-35. The Sixth Circuit saw the appropriateness of injunctive relief (and, implicitly, the presence of irreparable harm) in these cases as following ineluctably from *Hudson* and its own earlier application of *Hudson* in *Tierney*. *Id.* at 134.[7]

A writ of certiorari thus should be granted, because, if allowed to stand, the Third Circuit's decision that irreparable harm is not caused by denial of the first-amendment right to procedural safeguards in the collection of compulsory union fees will subvert this

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7 The Third Circuit, too, would have had to find injunctive relief appropriate here if it had it faced the full import of its statement in *Robinson v. New Jersey*, 806 F.2d 442, 446 (3d Cir. 1986) (emphasis added), *cert. denied*, 481 U.S. 1070 (1987), that the "effect of the Court's holding was to *disallow the collection* of representation fees under the regime established" in *Hudson*.

Court's holdings in the patronage cases that the "loss of First Amendment freedoms * * * unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373, and that "the inevitable tendency" of a system of mandatory assessments from the salaries of public employees is "to coerce employees into compromising their true beliefs," *Branti*, 445 U.S. at 513. Review also is necessary to resolve the direct conflict between the Third Circuit, on the one hand, and the Sixth Circuit and the Ohio Supreme Court, on the other, as to the propriety of injunctive relief in agency-shop "procedural" cases. Resolution by the Court is particularly important, given the large number of public employees in many states subjected to agency-shop requirements and the distorting impact that those requirements can have on the political and legislative processes.

II.

THE DISTRICT COURT'S DECISION ON THE MERITS RAISES SEVERAL SIGNIFICANT UNSETTLED ISSUES AS TO APPLICATION OF *HUDSON*'S PROCEDURAL REQUIREMENTS

Although the court of appeals only addressed the question of irreparable harm, by affirming denial of a preliminary injunction it left intact the district court's decision that the nonmembers would not prevail on the merits of any of their claims. That determination conflicts in several respects with decisions of other lower courts in applying *Hudson*. Thus, it raises important questions of federal constitutional law which should be settled by this Court to clarify the rights and obligations of nonunion employees, public employers, and unions under agency-shop arrangements. Because the district court's rulings on the merits rested solely upon its interpretation of the legal principles enunciated in *Hudson*, its rulings may be

reviewed on a plenary basis even though the appeal is from denial of a preliminary injunction. *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 757 (1986).

To obtain a preliminary injunction, it "is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability that it will prevail on the merits." *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975). The nonmembers have at least a reasonable likelihood of prevailing, indeed should prevail, on one or more of their claims that this fair share scheme does not provide all procedural safeguards outlined in *Hudson*. Other courts (and the district court itself) have reached conflicting conclusions and enjoined collection on grounds that the district court rejected in denying a preliminary injunction here.[8]

(a) The decision that the notice to nonmembers of the basis for the fee was timely conflicts with the district court's temporary restraining order and with other decisions applying *Hudson*. In granting the temporary

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8 In addition to the points addressed *infra*, the district court rejected a claim that the union's notice to nonmembers did not provide the kind of information needed for a nonmember to gauge the fee's propriety intelligently. App. C at 23a. The nature of the information that must be disclosed to comply with *Hudson*, 475 U.S. at 306-07, is an important question of federal constitutional law, and the district court conceded that "additional information may be desired" in this case, App. C at 23a. This issue therefore is included in the statement of questions presented, and counsel intend to argue it if certiorari is granted. However, because the issue necessarily turns on the information included in the specific notice, *see supra* p. 4, and there are no lower court decisions contrary to that of the district court, we do not argue it in this petition.

restraining order, the court ruled that "it appears that the notice was not provided in a timely manner." App. B at 14a. The court later reversed itself, reasoning that "there is no chance of impermissible use during [the 45-day] period" for objecting under the union's challenge procedure. App. C at 28a-30a. That overlooks the holding of *Hudson*, 475 U.S. at 303, that procedural safeguards are required before compulsory fees can be collected, not only to prevent misspending, but also to give the nonmember "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim."

It follows "that adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a *fait accompli*." *Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986). Because deprivation occurs when fees are deducted, "the notice and opportunity to object must occur prior to the deduction of any fair share fees." *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1430, 1447 (N.D. Ohio 1987); *see Tierney*, 824 F.2d at 1503. The notice held untimely in *Gilpin*, 643 F. Supp. at 735-38, was given a month before the first paychecks containing deductions were issued. If a month's notice is constitutionally insufficient, the week or less given here before deductions began clearly was too.

The district court also held that the procedure need not require the union to escrow fees deducted during the period before the deadline for challenges, asserting that the "Union need not foresee objections and set aside the money in anticipation." App. C at 22a. However, *Hudson*, 475 U.S. at 306, requires that "potential objectors" be given notice of the basis for the fee and their right to object. That presupposes that none of the fees for which

the notice is given can be spent before objections are received, for if they can, then the remedy "merely offers dissenters the possibility of a rebate [and] does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.* at 305. Therefore, other courts have held that the employer "may not withhold agency funds from nonmembers' checks until after the time for objection has passed *or* that the union must place said funds in an independently controlled, interest bearing escrow account for said time period." *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1333 (W.D. Mich. 1986); *see Tierney*, 824 F.2d at 1502-03.

(b) *Hudson* held that "adequate disclosure surely would include the major expenses [for collective bargaining and contract administration], as well verification by an independent auditor," for the exclusive representative and its affiliates, 475 U.S. at 306-07 & n.18, and that there must be an "appropriately justified advance reduction," *id.* at 309. The district court's holdings that those constitutional requirements are met here conflict with its own temporary restraining order, with two other district court decisions, and with *Tierney*.

The temporary restraining order said that "plaintiffs apparently have not been given adequate information with which to gauge the propriety of the union's fee calculation," because the notice "does not provide sufficient information regarding the funds delivered to affiliates of AFSCME Council 13." App. B at 14a-15a. Even in later denying a preliminary injunction, the district court admitted that there was a "difficult question * * * with respect to Council 13 payments to affiliated local unions." App. C at 23a. Nonetheless, the court concluded that it was acceptable to use no actual expense data for locals in the calculation and notice, but to instead presume that the

percentage of their chargeable expenditures is as great as that of Council 13. *Id.* at 23a-27a. Both *Lehnert v. Ferris Faculty Association*, 707 F. Supp. 1473, 1478-80 (W.D. Mich. 1988), and *Cramer v. Matish*, 705 F. Supp. 1234, 1238, 1240-41 (W.D. Mich. 1988), held the opposite, because a presumption "increases the risk that the reduced fee collection * * * would be in excess of what is appropriate" and denies nonmembers information needed to decide whether an objection is worth pursuing.

The district court also rejected as "without merit" the claim that the notice and calculation were inadequate because they did not include independent verification of the union's allocation of expenses as chargeable or not, following *Andrews v. Education Association*, 829 F.2d 335, 340 (2d Cir. 1987). App. C at 27a-28a. That claim is not meritless. *Andrews* directly conflicts with the Sixth Circuit's decision concerning the audit requirement in *Tierney*, 824 F.2d at 1503-04, which is more consistent with the need for "sensitivity in areas freighted with First Amendment concerns," *Hudson*, 475 U.S. at 303 n.12.

(c) The nonmembers argued that Act 84 and Council 13's notice and procedures incorporate arbitrary and overbroad standards for chargeable costs. The district court refused to consider those objections on the ground that "they raise substantive challenges to the amount of the fee [which] are more properly considered by the impartial decisionmaker." App. C at 30a. That ruling also is directly contrary to other decisions applying *Hudson*. The propriety of the legal definition of chargeable activities stated on the face of the statute and the union's procedure is purely an issue of federal constitutional law, properly considered by the courts in the first instance, as other courts have done. *E.g.*, *Tierney*, 824 F.2d at 1505-06; *Schneider v. Colegio de Abogados*, 682 F.

Supp. 674, 686-87 (D.P.R. 1988) (Torruella, Cir. J.); *Lehnert*, 707 F. Supp. at 1481-82. *See* Monaghan, *supra* p. 13, at 520-24.

Moreover, this is a claim on which the nonmembers should prevail. Act 84 authorizes a fair share fee equal to the "regular membership dues required of members of the exclusive representative less the cost * * * of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative." App. E at 37a. That is precisely the arbitrary, backwards method of calculation condemned in *Hudson*, 475 U.S. at 307: "An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *See Lehnert*, 643 F. Supp. at 1327, 1331.

The notice to nonmembers states the union's general standard of chargeability: "Included in the calculation of the fair share fee are expenses associated with * * * pursuing matters affecting the wages, hours and working conditions of employees represented by AFSCME." App. F at 45a. That is constitutionally overbroad on its face, since almost anything that a public-employee union does--even support of candidates--potentially "affects" the wages, hours, and working conditions of employees it represents. *See Lehnert*, 707 F. Supp. at 1482. The consequences of that overbreadth are evident in the list of chargeable activities in Council 13's notice, App. F at 46a, which includes activities that have been held nonchargeable, such as organizing, *Ellis*, 466 U.S. at 451-53; *Lehnert*, 643 F. Supp. at 1324-25.

CONCLUSION

As set forth above, the Third Circuit's decision, that some deprivations of the first-amendment freedoms not to speak or associate do not constitute irreparable harm, is contrary to and undermines this Court's decisions in the patronage cases, conflicts with decisions of another federal court of appeals and a state court of last resort applying the Court's holdings in *Hudson*, and, if not reversed, could permit distortion of the political and legislative processes in many states. The case also raises several significant issues as to the nature of the procedural safeguards that *Hudson* held to be required by the first amendment for the collection of compulsory union fees; as the lower courts are in disagreement, those issues should be settled by the Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1989

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 16, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5735

HOHE, MARY A.;
CASSEL, TIMOTHY L.;
CLOVER, JOSEPH F., III;
CLOVER, VICKIE M.;
EBERSOLE, STEVEN A.;
GARMAN, LINDA R.;
HETZEL, ARLENE J.;
HENCH, CAROL D.;
HILL, FRANCIS D. M., JR.;
KANTORCZYK, MARK A.;
LEBO, NANCY;
MAHER, GERALD J.;
MORRIS, JERI;
REEFER, JACK H., JR.; and
YOUNG, THOMPSON M., II,

Appellants

v.

ROBERT P. CASEY, Governor, Commonwealth of Pennsylvania; JOSEPH L. ZAZYCZNY, Secretary of Administration, Commonwealth of Pennsylvania; G. DAVIS GREENE, JR., State Treasurer, Commonwealth of Pennsylvania, the COMMONWEALTH OF PENNSYLVANIA; and COUNCIL 13, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Civil Action No. 88-1348

Argued January 26, 1989

BEFORE: GIBBONS, *Chief Judge*,
and SEITZ and GREENBERG,
Circuit Judges

(Filed February 16, 1989)

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Pennsylvania

OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

The plaintiffs appeal from the district court's order of September 15, 1988 denying their motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Since the plaintiffs have failed to show that they would suffer irreparable harm absent the issuance of a preliminary injunction, we will affirm.

We review the district court's order under an abuse of discretion standard. Thus, its decision "must be affirmed unless ... [it] has abused its discretion, committed an obvious error in applying the law or made a serious mistake in considering the proof. An abuse of discretion is a 'clear error of judgment' and not simply a different result which can arguably be obtained when applying the law to the facts of the case." *United Telegraph Workers, AFL-CIO v. Western Union Corp.*, 771 F.2d 699, 703 (3d Cir. 1985) (citations omitted); *see Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 958 (3d Cir. 1984). Although we will only summarize the facts briefly, inasmuch as they are set forth at length in the district court's opinion, *see Hohe v. Casey*, 695 F. Supp. 814 (M.D. Pa. 1988), we are aware that "what may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir. 1975).

On July 28, 1988, the collective bargaining agreement between AFSCME Council 13 (Union) and the Commonwealth of Pennsylvania (Commonwealth)

was amended to provide for fair share fee deductions,[1] authorized by section two of Act No. 84 of 1988 (Act 84), amending Pennsylvania's Administrative Code, 71 Pa. Stat. Ann. §§ 51-732 (Purdon 1962 & Supp. 1988).

Prior to the August 16, 1988, inception of fair share fee deductions, the Union, in accordance with the Act, mailed a notice between August 8 and August 12, 1988, to the approximately 18,000 fair share fee-payers, nonmembers of the union, it represented in collective bargaining with the Commonwealth. This notice provided information concerning the Union's calculation of the chargeable expenses comprising the fee, and the procedures it had established to enable fee-payers to challenge the fee. These procedures included a forty-five day objection period, one-hundred percent interest bearing escrow of challenged fees, and an impartial arbitrator to settle fee amount disputes.

The complaint in this case was filed on August 26, 1988, on behalf of the plaintiffs, fifteen Commonwealth employees, against the Commonwealth and its agents, and against the Union which was their exclusive bargaining representative, though they were nonmembers. Plaintiffs' compensation is, of course, subject to fair share fee deductions. The plaintiffs sought class certification. They asked for injunctive and declaratory relief under 42 U.S.C. § 1983 against the implementation of Section Two of Act 84, certain portions of the collective bargaining agreement between the Commonwealth and the Union providing for fair share fee collection, and the fair share fee collection procedures adopted by

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1. The term "fair share fee" is synonymous with the term "agency fee." "Under an 'agency shop' arrangement, a union that acts as an exclusive bargaining representative may charge non-union members, who do not have to join the Union or pay union dues, a fee for acting as their bargaining representative." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.10, 106 S.Ct. 1066, 1074 n.10 (1986).

the Union in its notice to nonmembers, all of which allegedly violate the First and Fourteenth Amendments. Plaintiffs also maintain that Act 84, the agreement, and the adopted procedures are facially unconstitutional.[2] In addition they asked for restitution.

When they filed their complaint, the plaintiffs sought a temporary restraining order and/or preliminary injunction to enjoin the implementation of Act 84, and specifically to enjoin the deduction of fair share fees authorized thereunder. On August 30, 1988, the district court issued a temporary restraining order against further collection of fair share fees. On September 9, 1988, the district court held a hearing on plaintiffs' motion for a preliminary injunction. At the hearing the Union bound itself to escrow one-hundred percent of all fair share fees deducted, not merely those challenged, until the impartial arbitrator's disposition of the challenges, and agreed to eliminate a certain portion of the fee[3] and refund that portion already

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2. Although Act 84 requires the employer to deduct the fair-share fee from non-members' paychecks even in the absence of the establishment of constitutional collection procedures by the union (*see* Act 84, § 2, adding § 2215(d) to the Administrative Code), it is the procedures followed by the Union which are at issue, since "the courts will not invalidate a statute on its face simply because it *may* be applied unconstitutionally, but only if it *cannot* be applied consistently with the Constitution." *Robinson v. State of New Jersey*, 806 F.2d 442, 446 (1986), *cert. denied*, ___U.S.___, 107 S.Ct. 2463 (1987). In any case, the plaintiffs' contention that the Union might under Act 84 obtain and spend fair share fees in other years before receiving challenges to them is irrelevant to the showing of immediate irreparable harm necessary for the granting of a preliminary injunction. (The district court addressed only "the procedural adequacy of the technical aspects of the Union's program and the notice sent to the plaintiffs." *Hohe*, 695 F. Supp. at 816).

3. The Union voluntarily eliminated that portion of the fee attributable to its AFL-CIO contributions.

collected, with interest. The district court denied the plaintiffs' motion by an order of September 15, 1988, which also lifted the August 30, 1988, temporary restraining order and permitted collection of the reduced fee, retroactive to August 16, 1988. Plaintiffs appeal from this order.[4]

Preliminarily we observe that "[t]o obtain a preliminary injunction, the moving party must demonstrate *both* a likelihood of success on the merits and the probability of irreparable harm if relief is not granted." *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir. 1987). It is clear, then, that "[a] party moving for preliminary injunctive relief must carry the burden of showing irreparable injury." *Oburn*, 521 F.2d at 150; *see Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 952 (1974); *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987); *Roberts v. Van Buren Pub. Schools*, 731 F.2d 523, 526 (8th Cir. 1984). Moreover, "[e]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'" *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (quoting *Continental Group, Inc. v. Amoco Chemical Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)).

The district court did not specifically mention the issue of irreparable harm but addressed the substantive issues and thus considered the likelihood of the plaintiffs' success on the merits. The court determined that the fair share collection procedures adopted by the Union as detailed in its notice to fair share fee-payers comported with the requirements set forth by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066 (1986).

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4. The plaintiffs' further motions for injunctive relief pending appeal, addressed to the district court and to this court, were denied.

In *Hudson*, the Supreme Court concluded that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the [fair share] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078. These mandated fee collection procedures are prophylactic rules necessary to:

> avoid the risk that dissenters' funds will be used temporarily for an improper purpose. '[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.'

Hudson, 475 U.S. at 305, 106 S.Ct. at 1075; *see Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1892 (1984).

The First Amendment interest protected by *Hudson's* requirements is the nonmembers' "interest in not being compelled to subsidize the propagation of political or ideological views that they oppose." *Hudson*, 475 U.S. at 305, 106 S.Ct. at 1075;[5] *see Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335.

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5. The *Hudson* Court specifically declined to adopt the position of the court of appeals in the case, that "the category of impermissible expenditures included all those that were not germane to collective bargaining, even if they might not be characterized as 'political or ideological.'" 475 U.S. at 299, 106 S.Ct. at 1072. The Court found it "unnecessary to resolve any question concerning non-germane, non-ideological expenditures." 475 U.S. at 304 n.13, 106 S.Ct. at 1074-75 n.13; *see id.* at 311, 106 S.Ct. at 1078 (White, J., concurring).

339 (2d Cir. 1987). Since the Union has escrowed the entire amount of all fair share fees deducted, from non-challengers as well as challengers, until disposition of the challenges by an impartial arbitrator, this interest is protected.

It is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976). But the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits. *See Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir. 1983). Rather the plaintiffs must show "a chilling effect on free expression." *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 1121 (1965). It is "purposeful unconstitutional [government] suppression of speech [which] constitutes irreparable harm for preliminary injunction purposes." *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984). Accordingly, it is the "direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983); *see Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977). Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 112-13, 103 S.Ct. 1660, 1671 (1983).

Neither *Hudson* nor the relevant Supreme Court cases defining First Amendment injury can be construed as authority for the proposition advanced by the plaintiffs that the mere deduction and collection of fair share fees from nonmembers' paychecks comprises constitutional harm of a magnitude requiring a

preliminary injunction insofar as those nonmembers may be deprived of money they might use to support their own political, ideological, or other purposes. The "chilling effect" referred to by the Supreme Court in *Dombrowski* resulted from threatened criminal prosecution of the plaintiffs authorized by state statute. In *Elrod*, the plaintiffs, sheriff's office employees, were forced to choose between their adherence to a political party of their choice and their continued employment. In this case the alleged impingement of the Union's fair share collection procedures on the plaintiffs' First Amendment rights simply fails to rise to that level of constitutional deprivation sufficient to show the irreparable harm necessary for the issuance of a preliminary injunction for "'[i]rreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate.'" *A.O. Smith Corp. v. Federal Trade Comm'n*, 530 F.2d 515, 525 (3d Cir. 1976) (quoting *Danielson v. Local 275, Laborers Union*, 479 F.2d 1033, 1037 (2d Cir. 1973)). The plaintiffs' remedy, should they succeed on the merits, will consist of restitution and/or monetary damages.[6] We also point out that in *In re Arthur*

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6. We observe that the standard remedy for violation of 42 U.S.C. § 1983 is compensatory damages. "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey v. Piphus*, 435 U.S. 247, 256, 98 S.Ct. 1042, 1048 (1978).

In *Roberts v. Van Buren Pub. Schools*, 731 F.2d at 523, the plaintiffs brought an action under 42 U.S.C. § 1983 alleging that the nonrenewal of their employment contracts was predicated upon violations of their First Amendment right of freedom of speech and association. In affirming the district court's denial of the plaintiffs' motion for preliminary injunctive relief, the court concluded that:

Treacher's Franchise Litigation, 689 F.2d 1137, 1145 (3d Cir. 1982), we said that "we have never upheld an injunction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law."

Finally we note that our holding conforms with Supreme Court precedent regarding the appropriate remedy after fair share/agency fee collection procedures have been found inadequate:

> In determining what remedy will be appropriate if the appellants [i.e., nonmember fee challengers] prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

Abood v. Detroit Bd. of Educ., 431 U.S. at 237, 97 S.Ct. at 1800. Thus the Supreme Court, in cases in which dissenting nonmembers of unions objected to deductions pursuant to collective bargaining agreements authorized by the Railway Labor Act, has rejected the granting of broad injunctions to provide the nonmembers with "interim relief against compliance with the financial obligations imposed by ... [collective bargaining] [a]greements." *Brotherhood of*

> the basis of appellants' complaint is the loss of their jobs and it is this injury which appellants seek to avoid through their request for preliminary injunctive relief. Should appellants prevail on the merits of their action they would be entitled to reinstatement and backpay relief. Because such relief would offer a complete remedy, the requirement of irreparable harm upon which a preliminary injunction must be based is not met.

Id. at 526.

Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 120, 83 S.Ct. 1158, 1163 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 771-73, 81 S.Ct. 1784, 1801-02 (1961).[7]

The order of the district court of September 15, 1988 will be affirmed.

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7. In *Abood*, the Supreme Court made it clear that "[a]lthough *Street* and *Allen* were concerned with statutory rather than constitutional violations," this distinction did not impact on its remedy analysis. 431 U.S. at 240-41, 97 S.Ct. at 1802. Of course our decision is not intended to intimate any opinion regarding the ultimate merits of plaintiffs' case. *See National Land & Inv. Co. v. Specter*, 428 F.2d 91, 100 (3d Cir. 1970).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

TEMPORARY RESTRAINING ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

August 30, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY A. HOHE, et al., Plaintiffs	
vs.	CIVIL ACTION NO. 88-1348
	FILED
ROBERT P. CASEY, Governor, et al.,	Harrisburg, Pa. Aug 30 1988
Defendants	/s/ Deputy Clerk

ORDER

THE BACKGROUND OF THIS ORDER IF [*sic*] AS FOLLOWS:

On July 13, 1988, the Governor of Pennsylvania signed Act No. 84 of 1988 thereby amending Pennsylvania's Administrative Code of 1929, 71 P.S. §§ 51-732. Act 84 authorizes labor unions to bargain for and collect a "fair share fee" from non-union Commonwealth employees in order to offset the cost of collective bargaining on behalf of the non-union employees. On July 28, 1988, the defendants amended their collective bargaining agreement to provide for the payment of such a fee. Beginning on or about August 4, 1988, they sent to the plaintiffs certain notices and financial disclosure materials as a prelude to the fee collection which commenced on August 16, 1988.

On August 26, 1988, the plaintiffs brought this lawsuit in which they seek injunctive and declaratory relief for themselves and others similarly situated. They are challenging the constitutionality of Act 84, both on its face and as applied by the defendants, under the first and

fourteenth amendments. Now before the court is the plaintiffs' motion for a temporary restraining order or a preliminary injunction. They allege several constitutional flaws in the defendants' collection plan, notice and financial disclosure which they claim cause irreparable injury and require immediate restraint.

It is clear that although agency shop or fair share fee programs impinge upon first amendment rights, with proper procedural safeguards, they are constitutional. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Such programs must minimize the risk that non-union employees' contributions might be used, even temporarily, for impermissible purposes. The constitutional requirements for a union's collection of agency fees include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson* at 310, 106 S.Ct. at 1078, 89 L.Ed.2d at 249.

It appears to the court that the notice supplied to the plaintiffs by the defendants does not comport with the standards established by the Supreme Court in *Hudson* and is thus constitutionally inadequate. Specifically, it appears that the notice was not provided in a timely manner and does not provide sufficient information regarding the funds delivered to affiliates of AFSCME Council 13. Thus the plaintiffs apparently have not been given adequate information with which to gauge the

propriety of the union's fee calculation. Finally, it appears that the escrow agreement is insufficient to safeguard the plaintiffs' rights.

Accordingly, this 30th day of August, 1988, upon consideration of the plaintiffs' motion for a temporary restraining order and a preliminary injunction, the exhibits and affidavits attached thereto, and the plaintiffs' verified complaint, it is ordered that a hearing on the plaintiffs' application for a preliminary injunction is scheduled for 11:30 a.m. on Friday, September 9, 1988, in Court Room 1, ninth floor, Federal Building, 228 Walnut Street, Harrisburg, Pennsylvania.

It is further ordered that pending the hearing of the motion for a preliminary injunction, the defendants, their employees, agents, attorneys and all other persons or entities acting in concert with or on behalf of the defendants, are hereby enjoined and restrained from deducting or retaining any additional fair share fees from the salaries of the plaintiffs and any other employees of the Commonwealth of Pennsylvania, or one of its agencies, who are represented for collective bargaining purposes by AFSCME Council 13, but who are not members of that union.

If said hearing does not occur within ten days, then this order shall expire by its own terms no later than ten days from entry, unless within that ten day period, for good cause shown, it is extended for a like period, or unless the defendants consent to a longer extension.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX C

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DENYING PRELIMINARY INJUNCTION

September 15, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY A. HOHE, et al., Plaintiffs	
VS.	CIVIL ACTION NO. 88-1348
	FILED
ROBERT P. CASEY, Governor, et al., Defendants	SEP 15 1988
	/s/

MEMORANDUM

Introduction

Through this action the plaintiffs present a constitutional challenge to Act No. 84 of 1988 which amended Pennsylvania's Administrative Code of 1929, 71 P.S. §§ 51-732 (Purdon 1962 and Supp. 1988), to allow labor unions to collect "fair share fees" from certain non-union Commonwealth employees. Pending for disposition is the plaintiffs' motion for a preliminary injunction in which they challenge the procedure utilized by the defendants to deduct the fee from their paychecks. At issue presently are the technical aspects of the implementation of the fee collection program and not the constitutionality of Act 84 or the fair share fee concept. As explained below, the plaintiffs' preliminary injunction motion will be denied and the temporary restraining order currently in effect will be lifted.

Background

On July 13, 1988, Act 84 amended Pennsylvania's Administrative Code to authorize labor unions to bar-

gain for and collect a "fair share fee" from certain non-union Commonwealth employees, in order to offset the cost of collective bargaining on behalf of said non-members. On July 28, 1988, AFSCME Council 13 and the Commonwealth amended their collective bargaining agreement to provide for the deduction of such fees from the paychecks of the plaintiffs and other non-members who are represented by the Union for collective bargaining purposes. Council 13 determined the non-members' fair share fee to be equal to 88.55% of the members' regular dues. Based on the union dues rate of 1.5% of base salary, the fair share fee was calculated to be 1.33% of a non-member's base salary. The Union determined the identities of the non-member fee payers from the Commonwealth's payroll records and informed the Commonwealth of the names and amounts to be deducted.

The Union prepared a notice to be sent to the non-member fee payers to explain how the fair share fee was calculated. The notice, dated August 8, 1988, lists the Union's audited expenses, broken down by major expense category, for the fiscal year that ended on June 30, 1987. Each category contains an allocation of chargeable and nonchargeable expenses and the notice contains a description of what expenses the Union considers to be chargeable and nonchargeable. It advises the fee payers of their rights to object to payment of the fee on religious grounds or to challenge the fee calculation itself within 45 days. When challenges are made, an impartial decisionmaker is to be appointed by the American Arbitration Association to conduct a hearing. At that hearing, Council 13 will have the burden of proof regarding the amount of the fair share fee and the accuracy of the underlying calculation of chargeable expenses. Upon

receipt of a challenge, the Union is to deposit in an interest bearing escrow account 100% of the fair share fee paid by the challenger. The fee will remain in escrow until resolution of the challenge by the decision-maker, and will then be distributed according to the ruling.

Between August 8 and August 12, 1988, the Union mailed notices to approximately 18,000 non-members. On August 16, 1988, the Commonwealth began deducting fair share fees. Pursuant to the collective bargaining agreement, the Commonwealth is to remit to Council 13 membership dues and fair share fees withheld in one month by the end of the following month. Accordingly, the fair share fees deducted in August are to be transferred to the Union by September 30, 1988. Pursuant to past practice, the Commonwealth will not remit the funds until on or about September 26, 1988.

On August 26, 1988, the 15 plaintiffs, Commonwealth employees who work in bargaining units represented by AFSCME Council 13, filed this lawsuit. The plaintiffs are not members of Council 13 and claim the Union and the Commonwealth have violated their first and fourteenth amendment rights by exacting the fair share fees. Also on August 26, 1988, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction, through which they challenge the constitutional adequacy of the procedure the defendants used to implement the fair share fee program. On August 30, 1988, the court restrained further fair share fee deductions pending a hearing on the preliminary injunction motion. Said hearing was conducted on September 9, 1988, and the plaintiffs' motion for preliminary injunction is now ripe for disposition.

Discussion

For a court to grant a request for a preliminary injunction:

> the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest."

In re Arthur Treacher's Franchise Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982) (quoting *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975)). Unless both probability of success and irreparable harm are demonstrated, preliminary injunctive relief is not to be granted. *Id.* (Citing *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982) (en banc)).

The only issues to be decided presently concern the procedural adequacy of the technical aspects of the Union's program and the notice sent to the plaintiffs. The question of the constitutionality of Act 84 or of fair share fee programs in general is not now before the court.[1] However, it is worthy of note that although fair

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[1] It goes without saying that from a social or political standpoint, the advisability of fair share fee programs is not a matter to be determined, or even addressed, by the court. The court is aware of, and understands, the plaintiffs' philosophical objections to fair share fee programs. However, their remedy for those concerns lies in the legislature, and the Pennsylvania General Assembly apparently has determined that a fair share fee program is in the best interest of the people of the Commonwealth and, accordingly, enacted Act 84. Absent a violation of the law or the Constituion, the court is without authority to overrule the state legislature on public policy matters.

share fee programs impinge upon first amendment rights, it is clear that with proper procedural safeguards, they are constitutional. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d. 261 (1977). Such programs must, however, "minimize the risk that nonunion employees' contributions might be used for impermissible purposes." *Hudson* 475 U.S. at 309, 106 S.Ct. at 1077, 89 L.Ed.2d at 248. The Supreme Court wrote in *Hudson* that:

> "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S., at 237, 97 S.Ct. at 1800.
>
> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Id. at 302-03, 106 S.Ct. at 1074, 89 L.Ed.2d at 244-45 (footnotes omitted).

The court's analysis of the procedural safeguards for the protection of the plaintiffs' first amendment rights begins with the Supreme Court's decision in *Hudson*.[2] The question in *Hudson*, as in the case at bar, was whether the procedure used by the Union adequately protected the plaintiffs' "constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Id.* at 301-02, 106 S.Ct. at 1073, 89 L.Ed.2d at 244 (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237, 97 S.Ct. 1782, 1800, 52 L.Ed.2d 261, _____ (1977)). The Court held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078, 89 L.Ed.2d at 249. The plaintiffs allege defects in the defendants' fair share fee program only with respect to the first and last of those requirements.

From the evidence adduced at the hearing in this matter, it is clear that the Union's program complies with the escrow requirement. Upon receipt of an objection, 100% of the objector's fair share fee is segregated and placed in escrow until the objection is ruled upon by the arbitrator. That aspect of the plan goes beyond the requirements of the *Hudson* decision, in which the Court

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[2] As in *Hudson*, the court will analyze the constitutionality of the Union's fee collection procedure from the perspective of first amendment concerns because "in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13, 106 S.Ct. at 1075 n.13, 89 L.Ed.2d at 245 n.13.

wrote that a 100% escrow is not mandatory because it would create "the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077-78, 89 L.Ed.2d at 249.

The plaintiffs' contentions that, even absent an objection, the Union must escrow all funds immediately upon receipt and that failure to do so amounts to the receipt of an involuntary loan are without merit. *Hudson* imposes no such requirement. The Supreme Court was clear in its pronouncement that the non-union employee has the burden of objection. The Union need not foresee objections and set aside the money in anticipation. The plaintiffs have proffered no sound reason for such a requirement and have directed the court to no cases imposing such a restriction. In fact, in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), a case heavily relied upon by the plaintiffs, the court expressly approved an escrow plan similar to the one at hand.

The plaintiffs' challenge to the Union's escrow arrangement in effect asks the court to supplement *Hudson's* procedural requirements with others that are not warranted under the facts of this case. Their arguments are aimed not at proving noncompliance with the strictures of *Hudson*, but at criticizing the balance between first amendment and Union interests struck in *Hudson*. That criticism necessarily falls on deaf ears since this court is without the power to change that balance.

The plaintiffs next contend that the defendants' fair share fee program is constitutionally infirm because it does not "include an adequate explanation of the basis for the fee" as required by *Hudson*. Specifically they assert that the Union has provided no financial informa-

tion about AFSCME's affiliated unions. They also argue that the notice shows that Council 13 pays *per capita* taxes to AFSCME International, the Pennsylvania AFL-CIO and "Central Labor Councils," yet no financial data is provided for the latter two groups, and an inadequate disclosure is provided for AFSCME International.

In an effort to meet the plaintiffs' objections, the Union has determined that it would not charge fair share fee payers for the AFL-CIO and Central Labor Councils *per capita* taxes and has recalculated the fee.[3] The court finds that procedure to be satisfactory and, in effect, it moots the plaintiffs' objection to the *per capita* expenses.

After carefully examining the notice, the court finds the financial information for AFSCME International, (Schedule 5), to be sufficient under *Hudson*. The notice sets forth each of the International Union's departments' expenses and designates each as chargeable or non-chargeable. Schedule 5, as supplemented by the notice's explanation of what constitute chargeable and nonchargeable expenses, adequately informs the plaintiffs of the bases for their share of the AFSCME International *per capita* tax and enables them to make intelligent objections. Though additional information may be desired, all that *Hudson* requires is that "potential objectors be given sufficient information to gauge the propriety of the union's fee." *Hudson* 475 U.S. at 306, 106 S.Ct. at 1076, 89 L.Ed.2d at 247. That has been done here.

A more difficult question arises with respect to Council 13 payments to affiliated local unions. The Union notice does not present the same type of information

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[3] The reduced fee amounts to 1.29% of the non-members' base salaries.

concerning local unions as it does for Council 13 itself. Instead, it provides as follows:

> AFSCME Council 13 has approximately 300 affiliated local unions. In accordance with the decisions of the federal courts AFSCME Council 13 has assumed in its calculations of the fair share fee that the percentage of the expenses of these local unions which are chargeable to fair share fee payers is at least as great as the percentage of chargeable expenses of AFSCME Council 13.

The plaintiffs assert that such a presumption is insufficient under *Hudson* and *Tierney* which, they argue, require that detailed financial information be provided for each affiliate that receives money from the Union.

The court notes that the only reference in *Hudson* to the adequacy of financial information for affiliate unions is found in a footnote that provides as follows:

> We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Railway Clerks v. Allen*, 373 US, at 122, 83 S Ct 1158, 10 L Ed 2d 235, quoted in *Abood*, 431 US, at 239-240, n 40, 97 S Ct 1782, 52 L.Ed 2d 261. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to it affiliated state and

> national labor organizations, ... for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Hudson, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18, 89 L.Ed.2d at 247 n.18. In discussing what information was required to be disclosed to fair share fee payers, the Court of Appeals for the Sixth Circuit interpreted footnote 18 as requiring that "[s]uch disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes." *Tierney*, 824 F.2d at 1503.

The Union argues that it has provided for a detailed accounting of affiliate expenses by applying the presumption quoted above, and cites the following cases as supporting the vitality of such a presumption: *Lowary v. Lexington Board of Education*, No. C86-1536A (N.D. Ohio March 3, 1988); *Gillespie v. Willard Board of Education*, No. C87-7043 (N.D. Ohio Sept. 28, 1987); *Andrews v. Education Association of Cheshire*, 653 F.Supp. 1373 (D. Conn. 1987), *aff'd* 829 F.2d 335 (2d Cir. 1987); and *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982), *rev'd on other grounds*, 741 F.2d 598 (3d Cir. 1984). The court finds the logic used by those courts to be sound and will follow the course laid by those cases.

Hudson does not require that each local expenditure be audited. *Gillespie*. As the *Andrews* court wrote:

> There is little basis for the conclusion that every document made part of every disclosure process

> employed by every union is to be subjected to an independent audit, regardless of the size of the union and the circumstances under which is operates....[W]hen considering the disclosure provisions of the plan as a whole, this court cannot find, on the basis of one clause of one sentence of one footnote in *Hudson*, that the failure to provide an audit of the explanatory memorandum itself, or the failure to require an independent audit for the [local unions'] expenditures, renders the proposed system constitutionally deficient.

Andrews, 653 F.Supp. at 1377. This court agrees with that assessment.

Lowary, *Gillespie* and *Andrews* found presumptions similar to that in the case at bar to be permissible. In *Andrews*, the court wrote that such a presumption "is necessary to avoid the potentially prohibitive cost of having to prove the individual percentages of nearly one hundred [local unions]," *Andrews*, 653 F.Supp. at 1377, and held that the "use of the evidentiary presumption that the statewide figure is appropriate for the locals satisfies constitutional requirements, even if in rare instances there may arise situations in which this presumption is incorrect." *Id.* at 1378.[4]

The court finds the utilization of the presumption in this case to be reasonable and constitutionally acceptable. However the court echoes the concerns of the *Lowary* court that it has before it no evidence that the

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[4] The issue of the use of the presumption was not raised on appeal. *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 338 n.1 (2d Cir. 1987).

local unions' expenditures parallel those of Council 13.[5] During the hearing, the Union did not come forward with evidence to prove that the presumption is founded in fact. However, the court finds it unnecessary to rule on the factual accuracy of the presumption in order to validate its use in the Union notice. As stated earlier, the purpose of the notice is to enable dissatisfied non-union members to form a basis for their objections to the amount of their fair share fees. The notice here is adequate for that purpose and whether it is in fact accurate is irrelevant to that determination. A dissenting non-member is entitled to object to the presumption and the Union will bear the burden of proving to the impartial decisionmaker that it is founded in fact.

The plaintiffs next argue that the Union's notice is inadequate because the financial information is not audited or verified. The plaintiffs do not dispute that independent auditors have verified that the dollar amounts listed in the notice were actually spent on the items represented. Instead, they contend that the auditors did not verify which part of the expenditures were chargeable to non-members and which parts were not.

The plaintiff's position is without merit. The Court of Appeals considered and rejected a similar argument in *Andrews* and wrote:

> Appellants' claim that *Hudson* requires that both the union's expenditures and its allocation of ex-

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[5] Apparently the *Gillespie* and *Andrews* courts similarly lacked such evidence. The basis for the presumption in those cases was dicta in *Robinson* that the local associations are less likely to engage in as extensive political activities as a state or national organization and thus the monies expended on those types of expenses would be less. However, the courts did not address any evidentiary concerns.

> penses to chargeable and nonchargeable categories be audited turns on an interpretation of the purpose of an audit. Appellants' approach to this problem would have the auditor making a legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and nonchargeable categories. We believe, however, that *Hudson's* auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses. The union's plan satisfies this requirement. The appellants' interpretation of *Hudson's* auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses.

Andrews, 829 F.2d at 340 (footnote omitted). The same result was reached in *Lowary* and *Gillespie*.

The plaintiffs also argue that the Union's notice is defective because it was untimely. Citing *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), *Gilpin v. AFSCME*, 643 F.Supp. 733 (C.D. Ill. 1986), and *Lehnert v. Ferris Faculty Association*, 643 F.Supp. 1306 (W.D. Mich. 1986), the plaintiffs contend that notice and financial information must be provided sufficiently in advance of the agency fee payroll deductions to enable them to make an intelligent decision whether to object to the amount of the deduction. The plaintiffs urge the court to adopt a thirty-day notice period as the constitutionally required minimum.

Under the facts of the case at bar, the court finds little support in the cases cited by the plaintiffs for requiring a

thirty day hiatus between receipt of the notice and deduction of the fee. In *Tierney*, the Court of Appeals for the Sixth Circuit simply said that "*Hudson* admonishes the union to give '*potential objectors* ... sufficient information to gauge the propriety of the union's fee,' before it collects any fees from non-members." *Tierney*, 824 F.2d at 1503 (citation omitted). That was done here. The *Gilpin* court declined to establish an arbitrary period of notice and held that "adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a *fait accompli*.... Once the Union informs management of its desire to assess 'fair share' fees in a specified amount, those against whom the fees will be assessed should also be notified of their right to object." *Gilpin*, 643 F.Supp. at 737-38. That also was done in this case. Finally, the *Lehnert* court wrote:

> In the spirit of *Hudson*, I think it constitutionally required that nonmembers have *at least* two weeks after receipt of "adequate information about the basis for the proportionate share" in which to consider the information and make a reasoned decision whether to object. Furthermore, in order to assure that a dissenter's funds are not temporarily used for objectionable purposes, I hold alternatively that Ferris may not withhold agency funds from nonmembers' checks until after the time for objection has passed *or* that the union must place said funds in an independently controlled, interest bearing escrow account for said time period.

Lehnert, 643 F.Supp. at 1332-33.

The court finds the approach adopted by the *Lehnert* court to be sound. That approach is consistent with

Hudson's admonition that the Union's procedure must avoid the risk that non-members' funds would be used, even temporarily, to finance ideological activities unrelated to collective bargaining. In the present case, the Union will not have access to the fair share fees until after the 45-day period for objecting has expired. Thus there is no chance of impermissible use during that period. Furthermore, once objections are filed, the funds will be escrowed and, again, the Union will not have them at its disposal. Therefore, the notice afforded the plaintiffs in this case was timely from a constitutional perspective.[6]

In the plaintiffs' final objections they raise substantive challenges to the amount of the fee. Such claims are more properly considered by the impartial decisionmaker and will not be ruled upon by the court. The plaintiffs are free to raise them under the arbitration procedure outlined in the defendants' notice.

Conclusion

After carefully reviewing the procedure implemented by the defendants to effectuate the collection of fair share fees, the court concludes that it comports with the constitutional requirements set forth in *Hudson* and its progeny. Accordingly, the court will deny the plaintiff's

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[6] At the hearing, the plaintiffs presented evidence that some of their number did not receive a copy of the Union's notice. Given the size of the mailing, that is not surprising. The fact that a very small number of non-members did not receive notice does not render the Union's procedure constitutionally defective.

motion for a preliminary injunction, and will lift the temporary restraining order. An appropriate order will issue.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: September 15, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY A. HOHE, et al., Plaintiffs	
vs.	CIVIL ACTION NO. 88-1348
ROBERT P. CASEY, Governor, et al., Defendants	

ORDER

AND NOW, this 15th day of September, 1988, after hearing the plaintiffs' motion for a preliminary injunction, it is ordered that:

1. The plaintiffs' motion is denied.

2. The temporary restraining order issued on August 30, 1988, is lifted and the Commonwealth of Pennsylvania may withhold and remit to AFSCME Council 13 the fair share fees, computed at a rate of 1.29%, retroactive to August 16, 1988.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

FILED

SEP 15, 1988

/s/

APPENDIX D

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 16, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5735

HOHE, MARY A.;
CASSEL, TIMOTHY L.;
CLOVER, JOSEPH F., III;
CLOVER, VICKIE M.;
EBERSOLE, STEVEN A.;
GARMAN, LINDA R.;
HETZEL, ARLENE J.;
HENCH, CAROL D.;
HILL, FRANCIS D. M., JR.;
KANTORCZYK, MARK A.;
LEBO, NANCY;
MAHER, GERALD J.;
MORRIS, JERI;
REEFER, JACK H., JR.; and
YOUNG, THOMPSON M., II,
Appellants

v.

ROBERT P. CASEY, Governor,
Commonwealth of Pennsylvania;
JOSEPH L. ZAZYCZNY, Secretary of
Administration, Commonwealth of
Pennsylvania; G. DAVIS GREENE, JR.,
State Treasurer, Commonwealth of
Pennsylvania, the COMMONWEALTH OF
PENNSYLVANIA; and COUNCIL 13,
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Civil Action No. 88-1348

Argued January 26, 1989
BEFORE: GIBBONS, *Chief Judge*, and SEITZ and
GREENBERG, *Circuit Judges*

No. 88-5735

Page 2

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel January 26, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 15, 1988, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mrvos
Clerk

February 16, 1989

Certified as a true copy and issued in lieu of a formal mandate on March 10, 1989.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

APPENDIX E

PURDON'S

PENNSYLVANIA LEGISLATIVE SERVICE

LAWS

General, Special and Local
Acts 1988-84 to 1988-102

Session of 1988
172nd Regular Session
Convened January 5, 1988

Act of July 13, 1988, P.L. 348,
No. 84 (71 P.S. § 575)

PENNSYLVANIA ACT NO. 1988-84

S.B.No. 291

AN ACT Amending the act of April 9, 1929 (P.L. 177, No. 175), entitled "An act providing for and reorganizing the conduct of the executive and administrative work of the Commonwealth by the Executive Department thereof and the administrative departments, boards, commissions, and officers thereof, including the boards of trustees of State Normal Schools, or Teachers Colleges; abolishing, creating, reorganizing or authorizing the reorganization of certain administrative departments, boards, and commissions; defining the powers and duties of the Governor and other executive and administrative officers, and of the several administrative departments, boards, commissions, and officers; fixing the salaries of the Governor, Lieutenant Governor, and certain other executive and administrative officers; providing for the appointment of certain administrative officers, and of all deputies and other assistants and employes in certain departments, boards, and commissions; and prescribing the manner in which the number and compensation of the deputies and all other assistants and employes of certain departments, boards and commissions shall be determined," further providing for the powers and duties of the State Board of Education; requiring certain State and public school employes to pay a fair share fee; and providing for objections to payment of a fair share fee.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 1317 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929, amended October 18, 1972 (P.L. 935, No. 224) and October 21, 1972 (P.L. 985, No. 244), is amended to read:

[Text of Amended Section 1317 omitted]

Section 2. The act is amended by adding a section to read:

Section 2215. Fair Share Fee; Payroll Deduction[2]

(a) As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Bona fide religious objection" shall mean an objection to the payment of a fair share fee based upon the tenets or teachings of a bona fide church or religious body of which the employe is a member.

"Commonwealth" shall mean the Commonwealth of Pennsylvania, including any board, commission, department, agency or instrumentality of the Commonwealth.

"Employe organization" shall mean an organization of any kind or any agency or employe representation committee or plan in which membership includes public employes and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employe-employer disputes, wages, rates of pay, hours of employment or conditions of work, but shall not include any organization which practices discrimination in membership because of race, gender, color, creed, national origin or political affiliation.

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[2] 71 P.S. § 575.

"Exclusive representative" shall mean the employe organization selected by the employes of a public employer to represent them for purposes of collective bargaining pursuant to the act of July 23, 1970 (P.L. 563, No. 195), known as the "Public Employe Relations Act."[3]

"Fair share fee" shall mean the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative.

"Nonmember" shall mean an employe of a public employer, who is not a member of the exclusive representative, but who is represented in a collective bargaining unit by the exclusive representative for purposes of collective bargaining.

"Public employer" shall mean the Commonwealth of Pennsylvania or a school entity.

"School entity" shall mean any school district, intermediate unit or vocational-technical school.

"Statewide employe organization" shall mean the Statewide affiliated parent organization of an exclusive representative, or an exclusive representative representing employes Statewide, and which is receiving nonmember fair share payments.

(b) If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.

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[3] 43 P.S. § 1101.101 et seq.

(c) To implement fair share agreements in accordance with subsection (b), the exclusive representative shall provide the public employer with the name of each nonmember who is obligated to pay a fair share fee, the amount of the fee that he or she is obligated to pay and a reasonable schedule for deducting said amount from the salary or wages of such nonmember. The public employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative.

(d) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a full and fair procedure, consistent with constitutional requirements, that provides nonmembers, by way of annual notice, with sufficient information to gauge the propriety of the fee and that responds to challenges by nonmembers to the amount of the fee. The procedure shall provide for an impartial hearing before an arbitrator to resolve disputes regarding the amount of the chargeable fee. A public employer shall not refuse to carry out its obligations under subsection (c) on the grounds that the exclusive representative has not satisfied its obligation under this subsection.

(e) Within forty (40) days of transmission of notice under subsection (d), any nonmember may challenge as follows:

(1) to the propriety of the fair share fee; or

(2) to the payment of fair share fees for bona fide religious grounds.

(f) Any objection under subsection (e) shall be made in writing to the exclusive representative and shall state

whether the objection is made on the grounds set forth in subsection (e)(1) or (2).

(g) When a challenge is made under subsection (e)(1), such challenge shall be resolved along with all similar challenges by an impartial arbitrator, paid for by the exclusive representative, and selected by the American Arbitration Association, or the Federal Mediation and Conciliation Service, pursuant to the Rules for Impartial Determination of Union Fees promulgated by the American Arbitration Association. The decision of the impartial arbitrator shall be final and binding.

(h) When a challenge is made under subsection (e)(2), the objector shall provide the exclusive representative with verification that the challenge is based on bona fide religious grounds. If the exclusive representative accepts the verification, the challenging nonmember shall pay the equivalent of the fair share fee to a nonreligious charity agreed upon by the nonmember and the exclusive representative. If the exclusive representative rejects the verification because it is not based on bona fide religious grounds, the challenging nonmember may challenge that determination within forty (40) days from receipt of notification.

(i) When a challenge is made under subsection (e)(1), the exclusive representative shall place fifty per centum (50%) of each challenged fair share fee into an interest-bearing escrow account until such time as the challenge is resolved by an arbitrator. When a challenge is made under subsection (e)(2), the exclusive representative shall place one hundred per centum (100%) of each challenged fair share fee into an interest-bearing escrow account until such time as the challenge is resolved by an arbitrator.

(j) Every Statewide employe organization required to submit a report under Title II of the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86-257, 29 U.S.C. § 401 et seq.) shall make available a copy of such report to the Secretary of Labor and Industry.

(k) All materials and reports filed pursuant to this section shall be deemed to be public records and shall be available for public inspection at the Office of the Secretary of Labor and Industry during the usual business hours of the Department of Labor and Industry.

(l) Any employe organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars ($2,000).

(m) Any person who wilfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars ($1,000) or undergo imprisonment for not more than thirty (30) days, or both. Each individual required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false.

Section 3.[4] If any clause, sentence, paragraph or part of this act, or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act and the application of such provision to other persons

[4] 71 P.S. § 575 note.

or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act would have been adopted had such invalid provisions not been included.

Section 4. Sections 401 and 705 of the act of July 23, 1970 (P.L. 563, No. 195), known as the Public Employe Relations Act,[5] are repealed insofar as they are inconsistent with this act.

Section 5. This act shall take effect immediately.

Approved July 13, 1988.

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[5] 43 P.S. §§ 1101.401, 1101.705 (Rep. in Part).

APPENDIX F

NOTICE TO ALL NON-UNION MEMBER FAIR SHARE FEE PAYERS

August 8, 1988

Council 13 AFSCME
American Federation of State, County and Municipal Employees • AFL-CIO
4031 Executive Park Drive, Harrisburg, PA 17111-1599
(717) 564-9312 • 1-800-5-AFSCME

Edward J. Keller
Executive Director

[Listing of Additional Officers Omitted]

August 8, 1988

NOTICE TO ALL NON-UNION MEMBER FAIR SHARE FEE PAYERS

Dear Commonwealth Employee:

As you may know on July 13, 1988, Governor Casey signed Senate Bill 291 which requires state employees who enjoy the benefits and advantages of a collective bargaining agreement to pay to the union their fair share of the cost of collective bargaining and related activities.

Based on our calculations, your fair share, as a non-union member, is 88.55 percent of the regular dues paid by an AFSCME member. AFSCME members pay 1.5 percent of their base salary as union dues. Thus, your fair share will be 1.33 percent of your salary (88.55 percent x 1.5 percent = 1.33 percent). As you can see, for only pennies more per pay day, you can enjoy the full advantages of union membership.

As a full-fledged union member, you will enjoy a whole host of benefits which are available only to AFSCME members and not to fair share fee payers. The following is but a partial list of these benefits:

1. The right to attend and participate in AFSCME meetings;

2. The right to participate in the development and formulation of AFSCME policy;

3. The right to run for office in AFSCME;

4. The right to run for a delegate's position to the Council 13 Convention and the International Convention;

5. The right to participate in the formulation of AFSCME demands in collective bargaining;

6 The right to vote or participate in AFSCME contract ratification meetings;

7. The right to receive those benefits and participate in those programs which are limited solely, and available exclusively, to AFSCME members and their families such as the AFSCME Scholarship Program and the cost saving AFSCME Credit Card Program;

8. Membership in AFSCME means that you are a member of:

   — the largest full-fledged participating union in the AFL-CIO;

   — the largest public employee union in the AFL-CIO;

   — the largest public employee union in the Pennsylvania AFL-CIO;

   — The fastest growing union in the country;

   — the union with the greatest growth record in the last decade.

As we enter the first phase of our new three year contract with the Commonwealth, which includes significantly increased funding for major health, welfare, medical and hospitalization benefits, you will want to be part of the process pursuant to which these programs are

developed and implemented. Your input and that of your fellow employees is important and critical so that we can offer to you and your family the best possible program coverage. **AFSCME membership guarantees your right of full participation in the development of the various programs so as to insure the receipt of benefits by you and your loved ones in accordance with the terms and provisions of the various plans.** Remember that full benefits are available only to members of the AFSCME bargaining units!!

As we pointed out above, for just pennies more per day, you can enjoy full AFSCME membership with all of its benefits. We, therefore, urge you to fill out, sign and return the enclosed AFSCME dues deduction card today.

Upon receipt of your card, we will immediately change our records to reflect your new status as an AFSCME member with full participation rights in all AFSCME benefit programs. AFSCME benefit plans are for AFSCME bargaining unit members and their families exclusively.

Fraternally,

/s/

Edward J. Keller, *Executive Director*
AFSCME Council 13

Notice to All Nonmember Fair Share Fee Payers

This notice is being provided to all individuals who pay fair share fees to Council 13 of the American Federation of State County and Municipal Employees (AFSCME) under a collective bargaining agreement between AFSCME Council 13 and the Commonwealth of Pennsylvania. Such notice is required by Pennsylvania Senate Bill No. 291 and the AFSCME International Constitution. **Please read this Notice carefully. It contains important information and procedures regarding your legal rights.**

The AFSCME Council 13 Fair Share Fee

As a nonmember fair share fee payer you are being charged a fair share fee which is equal to your pro rata share of expenses for activities or undertakings which are reasonably employed to implement or effectuate the duties of AFSCME as your exclusive bargaining representative. Included in the calculation of the fair share fee are expenses associated with the collective bargaining process, contract administration, and pursuing matters affecting the wages, hours and working conditions of employees represented by AFSCME. The categories of expenses which are chargeable to fair share fee payers, the categories of nonchargeable expenses and the actual calculation of chargeable and nonchargeable expenses of AFSCME Council 13 and the AFSCME International are set forth in detail below. Also included in this Notice are descriptions of the procedures by which a nonmember fair share fee payer can object to the payment of the fair share fee to AFSCME Council 13 on bona fide religious grounds or challenge the accuracy of AFSCME Council 13's calculation of the fair share fee.

Categories of Chargeable and Nonchargeable Expenses

AFSCME, AFSCME Council 13 and its affiliated local unions spend a portion of the dues and fees collected from members and nonmembers on the following activities and undertakings. AFSCME Council 13 has determined that a pro rata portion of all of the expenses associated with the following activities and undertakings are properly chargeable to fair share fee payers.

1. Gathering information in preparation for the negotiation of collective bargaining agreements.
2. Gathering information from employees concerning collective bargaining positions.
3. Negotiating collective bargaining agreements.
4. Adjusting grievances pursuant to the provisions of collective bargaining agreements, as well as representing employees in proceedings under civil service laws, merit systems or regulations.
5. Administration of ballot procedures on the ratification of negotiated agreements.
6. The public advertising of AFSCME's and AFSCME Council 13's positions on the negotiation of, or provisions in, collective bargaining agreements.
7. Purchasing books, reports, and advance sheets used in (a) negotiating and administering collective bargaining agreements, and (b) processing grievances.
8. Paying technicians in labor law, economics and other subjects for services used (a) in negotiating and administering collective bargaining agreements, and (b) processing grievances.
9. Organizing within the bargaining unit in which fair share fee payers are employed.

10. Organizing employees in other bargaining units.
11. Seeking to gain representation rights in units not represented by AFSCME or AFSCME Council 13 including units where there is an existing designated representative.
12. Defending AFSCME and AFSCME Council 13 against efforts by other unions or organizing committees to gain representation rights in units represented by AFSCME or AFSCME Council 13.
13. Serving as exclusive representative in other bargaining units.
14. Proceedings regarding jurisdictional controversies under the AFL-CIO constitution.
15. Membership meetings and conventions held, in part, to determine the position of employees on collective bargaining issues, contract administration and other matters affecting wages, hours and working conditions.
16. Publishing newspapers and newsletters which concern collective bargaining issues, contract administration and other matters affecting wages, hours and working conditions.
17. Impasse procedures, including fact-finding, mediation, arbitration, essential worker determinations, or work stoppages over provisions of collective bargaining agreements and the administration thereof.
18. The prosecution or defense of litigation or charges to obtain ratification, interpretation, or enforcement of collective bargaining agreements.

AFSCME, AFSCME Council 13 and its affiliated Local unions spend a portion of dues and fees collected from members and nonmembers on the following activities and undertakings. AFSCME Council 13 has determined that a pro rata portion of the expenses associated with the following activities and undertakings are chargeable to fair share fee payers depending upon whether they were reasonably employed to implement or effec-

tuate the duties of AFSCME as your exclusive bargaining representative.

19. The public advertising of AFSCME's and AFSCME Council 13's position on subjects other than the negotiation of collective bargaining agreements.

20. Purchasing books, reports, and advance sheets used in activities or for purposes other than negotiating collective bargaining agreements and processing grievances.

21. Paying technicians in labor law, economics and other subjects for services used in activities other than negotiating collective bargaining agreements and processing grievances.

22. Lobbying for legislation or regulations or to effect changes in legislation or regulations before Congress, State legislatures, Local legislative bodies and Local, State or Federal agencies.

23. Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the agency fee payer's employment.

24. Membership meetings and conventions held for purposes other than to determine the position of employees on collective bargaining issues, contract grievances administration or other matters affecting wages, hours and working conditions.

25. Publishing newspapers and newsletters which, in part, concern services other than collective bargaining issues, contract administration or other matters affecting wages, hours and working conditions.

26. Prosecution or defense of litigation or charges on matters other than the ratification, interpretation, or enforcement of collective bargaining agreements.

27. Social and recreational activities.

28. Payments for insurance, medical care, retirement, disability, death, and related benefit plans for union employees.

29. Administrative activities and expenses allocable to AFSCME's and AFSCME Council 13's activities and expenses for which fair share fee payers are charged.

AFSCME, AFSCME Council 13 and its affiliated locals spend a portion of dues and fees collected from members and nonmembers on the following activities. AFSCME Council 13 has determined that none of the expenses associated with these activities or undertakings are chargeable to fair share fee payers.

30. Training in voter registration, get-out-the-vote and political campaign techniques.

31. Supporting and contributing to charitable organizations.

32. Supporting and contributing to political organizations and candidates for public office.

33. Supporting and contributing to ideological causes unrelated to collective bargaining.

34. Supporting and contributing to international affairs.

The AFSCME Council 13 Fair Share Fee

Applying these categories of chargeable and nonchargeable expenses to the activities and undertakings of AFSCME, AFSCME Council 13 and its affiliated locals for the most recent periods for which independently audited financial expenses are available it was determined that 88.55% of the total expenses of AFSCME, AFSCME Council 13 and its affiliated locals were chargeable to fair share fee payers. Applying this percentage to the dues rate charged to AFSCME Council 13 members (1.5% of base wages) a fair share fee of 1.33% of the base pay of the nonmember fee payer was established (88.55% × 1.5% = 1.33625%). This fare share fee will be effective for the period from July 1, 1988 to June 30, 1989.

The AFSCME Council 13 fair share fee is based upon the following audited financial information. This financial information sets forth the expenditures of AFSCME and AFSCME Council 13 in major categories of expenditures audited by an independent accountant. The following schedules detail the portions of total audited expenditures which are chargeable to fair share fee payers.

AFSCME Council 13 has approximately 300 affiliated local unions. In accordance with the decisions of the federal courts AFSCME Council 13 has assumed in its calculations of the fair share fee that the percentage of the expenses of these local unions which are chargeable to fair share fee payers is at least as great as the percentage of chargeable expenses of AFSCME Council 13.

PENNSYLVANIA PUBLIC EMPLOYEES COUNCIL 13
OF THE AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES AFL-CIO
Calculation of Chargeable Expenses
Year Ended June 30, 1987

	Total Expenses*	*Chargeable Expenses*	*Non Chargeable Expenses*
Personnel - *Schedule 1*	$4,831,839	$4,532,262	$299,577
Operating - *Schedule 2*	1,113,272	1,029,823	83,449
Administrative - *Schedule 3*	718,533	672,503	46,030
Service council costs - *Schedule 4*	733,758	651,702	82,056
Members benefits	266,580	—	266,580
Convention costs	142,993	128,694	14,299
Local Union dues	1,460,767	1,359,828	100,939
Per capita taxes -			
-AFSCME International *Schedule 5*	2,644,308	2,196,865	447,443
-Penn. AFL-CIO	148,303	113,209	35,094
-Central Labor Councils	62,105	49,063	13,042
Total expenses	$12,122,458	$10,733,949	$1,388,509
Percentages	100.00%	88.55%	11.45%

Council 13 dues rate — percentage of base wages		1.50%
Less non chargeable	11.45% x 1.50% =	0.17%
Dues rate for objector for agency fee payers		1.33%

* Expense figures as audited by Buchbinder, Stein, Tunick & Platkin, Certified Public Accountants.

—SCHEDULE 1—

PENNSYLVANIA PUBLIC EMPLOYEES COUNCIL 13 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO

Schedule of Personnel Expenses

Year Ended June 30, 1987

	Total Expenses	*Chargeable Expenses*	*Non Chargeable Expenses*
Salaries	$2,964,095	$2,782,160	$181,935
Temporary help	424	424	—
Payroll taxes	268,503	252,017	16,486
Employee benefits	796,167	747,282	48,885
Travel and allowances	802,650	750,379	52,271
	$4,831,839	$4,532,262	$299,577

—SCHEDULE 2—

PENNSYLVANIA PUBLIC EMPLOYEES COUNCIL 13 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO

Schedule of Operating Expenses

Year Ended June 30, 1987

	Total Expenses	*Chargeable Expenses*	*Non Chargeable Expenses*
Arbitration	$295,609	$295,609	$ —
Negotiations	11,701	11,701	—
Affiliation fees	452	357	95
Educational	254,183	254,183	—
Executive board	60,047	60,047	—
Newspaper printing and mailing	105,218	77,514	27,704
Public relations	16,727	12,323	4,404
Legislative activities	187,087	158,549	28,538
Labor management meetings	24,430	24,430	—
Meetings	37,230	33,261	3,969
Participations	10,239	—	10,239
Health care alliance	9,500	9,500	—
Legal	91,349	91,349	—
Contributions	9,500	1,000	8,500
	$1,113,272	$1,029,823	$83,449

—SCHEDULE 3—

PENNSYLVANIA PUBLIC EMPLOYEES COUNCIL 13 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO

Schedule of Administrative Expenses

Year Ended June 30, 1987

	Total Expenses	*Chargeable Expenses*	*Non Chargeable Expenses*
Rent and Utilities	$248,417	$233,164	$15,253
Telephone	33,745	31,673	2,072
Interest	165,455	155,296	10,159
Office services and expenses	9,207	8,642	565
Office supplies	32,066	30,097	1,969
Real estate taxes	36,576	34,330	2,246
Repairs and maintenance	27,983	26,265	1,718
Employee relocation	5,166	4,849	317
Postage	27,557	25,865	1,692
Books, periodicals and subscriptions	947	889	58
Depreciation	129,866	121,892	7,974
Equipment rental	26,396	24,775	1,621
Data processing	22,899	22,899	—
Gifts and condolences	3,535	—	3,535
Insurance	31,227	29,310	1,917
Auditing	36,400	34,165	2,235
Other professional fees	10,816	10,152	664
	848,258	794,263	53,995
Less rent income	129,725	121,760	7,965
	$718,533	$672,503	$46,030

—SCHEDULE 4—

PENNSYLVANIA PUBLIC EMPLOYEES COUNCIL 13 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO

Schedule of Service Council Expenses

Year Ended June 30, 1987

	Total Expenses	*Chargeable Expenses*	*Non Chargeable Expenses*
Executive Board	$83,112	$83,112	$ —
Travel	33,590	32,176	1,414
Meetings	36,379	34,847	1,532
Conferences/conventions	1,771	1,696	75
Delegate assembly	13,240	13,240	—
Education	7,752	7,752	—
Negotiations	4,804	4,804	—
Arbitration	4,996	4,996	—
Public relations	3,190	—	3,190
Participations	16,869	—	16,869
Affiliation fees	780	616	164
Labor/management	13,833	13,833	—
Telephone	137,708	131,910	5,798
Stationery and supplies	33,861	32,435	1,426
Postage	20,740	19,867	873
Equipment rental	58,558	56,093	2,465
Insurance	6,299	6,034	265
Legal	76,920	76,920	—
Auditing	22,784	21,825	959
Gifts and condolences	4,468	—	4,468
Contributions	2,220	—	2,220
Depreciation	20,455	19,594	861
Office services	12,682	12,148	534
Maintenance	33,839	32,414	1,425
Organizing	2,896	2,896	—
Legislative	35,650	—	35,650
Real estate taxes	625	599	26
Consultant fees	26,749	25,623	1,126
Subscriptions	3,123	2,992	131
Rent (storage)	703	673	30
Miscellaneous	252	241	11
Utilities	12,910	12,366	544
Total	$733,758	$651,702	$82,056

—SCHEDULE 5—

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO

Calculation of Chargeable Expenses

Year Ended December 31, 1987

International Expense	*Total 1987 International Expenses**	*Total Chargeable Expenses*	*Allocated Non Chargeable Expenses***
Field Service	$15,343,325	$15,142,665	$200,660
Assistance to Affiliates	2,185,381	1,611,281	574,100
Education	1,359,875	1,299,379	60,496
Women's Rights/ Community Affairs	881,890	829,491	52,399
Research	1,721,388	1,700,344	21,044
Legislation	753,103	729,063	24,040
Political Action & PEOPLE	4,502,331	149,240	4,353,091
Retirees	452,629	433,065	19,564
Public Policy	828,481	825,543	2,938
Public Affairs	6,059,105	5,465,148	593,957
President's Office	1,457,721	1,239,063	218,658
Convention	1,180,000	1,003,000	177,000
Inter-Union Affiliations	5,008,044	3,760,393	1,247,651
International Affairs	382,681	—	382,681
Legal Services	2,415,024	2,052,770	362,254
Executive Board	937,874	797,193	140,681
Personnel	267,842	227,666	40,176
Judicial Panel	499,871	499,871	—
Secretary-Treasurer	675,379	574,072	101,307
Finance & General Operating	7,073,405	6,511,425	561,980
Totals	$53,985,349	$44,850,672	$9,134,677

Total Chargeable Expense (1987)	$44,850,672	=	83.079%
Total International Expense (1987)	$53,985,349		

* Expense figures as audited by Buchbinder, Stein, Tunick & Platkin, Certified Public Accountants

** Includes an allocation of Indirect or Overhead Expense

AFSCME Council 13 Procedures For Objecting To The Payment Of A Fair Share Fee On Bona Fide Religious Ground And Challenging The Amount Of The Fair Share Fee

Under Senate Bill No. 291 and the AFSCME International Constitution nonmember fair share fee payers have a right to challenge the accuracy of AFSCME's calculation of the amount of the fair share fee. Nonmembers also have a right to object to the payment of a fair share fee to AFSCME Council 13 on bona fide religious grounds. AFSCME Council 13 has implemented the following procedures for the protection of these rights. **Please read these procedures carefully. You must comply with these procedures in order to object to the payment of the fair share fee on religious grounds or to challenge the amount of the fair share fee.**

Religious Objection to the Payment of Fair Share Fees

A nonmember fair share fee payer may register an objection to the payment of the fair share fee to AFSCME Council 13 on bona fide religious grounds. If the nonmember's religious objection is sustained the objector shall pay the equivalent of the fair share fee to a non religious charity agreed upon by the objecting nonmember and AFSCME Council 13.

In order to register a religious objection a nonmember fair share fee payer must notify AFSCME Council 13, individually, in writing, mailed to the address indicated below and postmarked no later than 45 days after the date of this notice. The written objection must contain the following information: the objecting nonmember's name, social security number, job title, employing department or agency and work location. In addition the religious objector must provide verification that the objection is based on bona fide religious grounds.

Upon receipt of the nonmember's religious objection AFSCME Council 13 will review the information provided and decide whether to accept the nonmember's religious objection. If AFSCME Council 13 accepts the religious objection the union will contact the objector regarding the selection of an appropriate non religious charity to which the fair share fee shall be paid. If AFSCME Council 13 does not accept the nonmember's religious objection the union will so inform the objecting nonmember. Upon receipt of the notification the objecting nonmember will have 40 days to appeal the rejection to an impartial decisionmaker.

During the pendancy of the appeal of AFSCME Council 13's denial of the nonmember's religious objection AFSCME Council 13 will place 100% of the nonmember's fair share fee in an interest bearing escrow account. The appeal will be resolved by an arbitrator paid for by AFSCME and selected by the American Arbitration Association.

Nonmember fee payers must mail their written religious objection, postmarked no later than 45 days from the date of this notice, to:

Religious Objection
AFSCME Council 13
4031 Executive Park Drive
Harrisburg, Pennsylvania 17111-1599
Attn: Jesse Evans

Challenge to the Amount of the Fair Share Fee

Individual nonmember fair share fee payers who wish to challenge the AFSCME Council 13 calculation of chargeable expenses and the amount of the fair share fee set forth in this notice must do so individually and in writing. The written challenge must include the challenger's name address, social security number, job title, employing agency or department and work location.

The written challenge must be sent to AFSCME Council 13 by mail, postmarked no later than 45 days from the date of this Notice, to the following address.

Fair Share Fee Challenge
AFSCME Council 13
4031 Executive Park Drive
Harrisburg, Pennsylvania 17111-1599
Attn: Jesse Evans

An impartial decisionmaker will be appointed by the American Arbitration Association to resolve all challenges to the AFSCME Council 13 fair share fee. All challenges to the AFSCME Council 13 fair share fee will be consolidated into a single proceeding. The impartial arbitrator will hold hearings in which the challenger(s) can participate personally or through a representative. In these hearings AFSCME Council 13 will have the burden of proof regarding the amount of the fair share

fee and the accuracy of the underlying calculation of chargeable expenses. The challenger(s) will be given an opportunity to present their own evidence and to present written arguments in support of their challenge(s). The arbitrator will issue a written decision and award on the basis of the evidence and argument presented. The challenger(s) will receive further information regarding the hearing, including the time and the place of the hearing, directly from the American Arbitration Association.

Upon receipt of a written challenge AFSCME Council 13 will deposit, in an interest bearing escrow account, 100% of the fair share fee paid by the challenger pending resolution of their challenge. The fair share fees shall remain in escrow until the arbitration award issues and shall be distributed, along with accrued interest, pursuant to the arbitrator's ruling.

Harrisburg, Pennsylvania

August 8, 1988

Supreme Court, U.S.
FILED
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No. 89-51

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MARY A. HOHE, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, GOVERNOR,
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below abused their discretion in denying a preliminary injunction against the collection of fair share fees.

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 2-3.

STATEMENT OF THE CASE

a. *The Background Facts.* Pennsylvania Act No. 84 of 1988 permits labor unions representing the Commonwealth's employees to negotiate agreements requiring represented employees to pay a "fair share fee" to support the cost of collective bargaining. Pet. App. 13a. The Act limits fair share fees to an amount equal to normal union dues less a proportional reduction equal to the

costs incurred by the union during the previous fiscal year for "activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employee organization as exclusive representative." Penn. Act 84, § 2215(a), Pet. App. 37a. As a "precondition to the collection of fair share fees," the statute requires that the union establish "a full and fair procedure" to protect against any excessive charges. Penn. Act 84 § 2215(d), Pet. App. 38a. The union procedure must include an annual notice containing "sufficient information to gauge the propriety of the fee," and "an impartial hearing before an arbitrator to resolve disputes regarding the amount of the chargeable fee." *Id.* While a challenge is pending, the statute requires that at least 50% of the challenging fee payer's payments be held in an interest-bearing escrow account. Penn. Act 84, § 2215(i), Pet. App. 39a.

Pursuant to this statutory authorization, which took effect on July 13, 1988, the Commonwealth negotiated a fair share fee agreement with Council 13 of the American Federation of State, County and Municipal Employees (AFSCME) providing for deductions to begin on August 16, 1988. Pet. App. 17a-18a. (Under this agreement, Council 13 would not actually receive the fees deducted in August until the end of September. Pet. App. 18a.)

Between August 8 and 12, prior to commencement of fair share fee deductions, Council 13 mailed a notice to fair share fee payers advising that the Council had determined on the basis of its audited expense figures for the preceding year that the fair share fee to be charged would be 88.55% of normal union dues, explaining the basis of that calculation, and outlining the rights of fee payers who wished to challenge the fee's amount. Pet. App. 17a-18a.

Council 13's notice contains a detailed list of expenditure categories classified as either chargeable or nonchargeable. Pet. App. 46a-49a. The notice also contains the audited figures, by major expense category, of expenditures by Council 13 and by the AFSCME National Union during the previous fiscal year; these audited figures are further broken down to show the chargeable and nonchargeable expenditures in each major expense category. Pet. App. 51a-56a.

Council 13's notice, in addition, explains that each fee payer has forty-five days in which to challenge the amount of the fee, that such challenges would be heard by an impartial arbitrator appointed by the American Arbitration Association in proceedings where the Union bears the burden of proving that the fee is in the correct amount, and that, during a challenge, Council 13 would escrow 100% of the challenger's payments. Pet. App. 59a-60a.

b. *The Proceedings In This Case.* Shortly after fair share fee deductions began, the petitioners filed the instant lawsuit challenging the Pennsylvania statute on its face and as applied under the agreement between the Commonwealth and Council 13. Pet. App. 13a. The petitioners moved for a temporary restraining order and preliminary injunction against the deduction of fees. Pending a hearing on the preliminary injunction, the district court granted a temporary restraining order against the further deduction of fees. Pet. App. 14a-15a.

The preliminary injunction hearing was held on September 9, 1988. Pet. App. 18a. At this hearing, Council 13 bound itself to change the definition of chargeable expenditures to exclude certain per capita payments to affiliated labor federations and to refund the portion of collected fees attributable to such payments, thereby reducing the fee to 85.89% of dues (rather than the

original 88.55%), and to escrow 100% of all agency fees collected pending completion of its internal procedures if any fee payer made a challenge. Pet. App. 6a & n.3 and 23a.

On September 15, 1988, the district court denied the petitioner's motion for a preliminary injunction and vacated the temporary restraining order against the collection of fair share fees. Pet. App. 30a-31a. After considering each of the petitioners' contentions, the district court concluded that the petitioners were unlikely to prevail on the merits since it appeared that Council 13's notice and its objection procedures satisfy the constitutional requirements stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). That court summarized its findings as follows:

> After carefully reviewing the procedure implemented by the defendants to effectuate the collection of fair share fees, the court concludes that it comports with the constitutional requirements set forth in *Hudson* and its progeny. [Pet. App. 30a.]

The court of appeals unanimously affirmed the district court's denial of a preliminary injunction. Pet. App. 12a. The court of appeals begins by reviewing, and approving, the district court's findings that Council 13's procedures adequately protect the interests of fee payers identified in *Hudson*. Pet. App. 7a-9a. The appellate court then goes on to rule that in light of the fact that Council 13 was holding all collected fees in escrow during any challenge to the fee, the petitioners could not establish irreparable injury. Pet. App. 9a-11a. Finally, the court of appeals reviewed this Court's precedents regarding the appropriate remedy in agency fee cases, and concluded that those precedents teach that issuing a preliminary injunction here would be improper. Pet. App. 11a-12a.[1]

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[1] So that the Court is fully informed, we note that during the appeal of the interlocutory order at issue here, the parties filed

ARGUMENT

The *certiorari* petition focuses on the abstract question of whether a court may deny a plaintiff's request for a preliminary injunction prohibiting the collection of agency fees if the plaintiff has demonstrated some—undefined—failure by a union to meet the requirements on assessing and collecting such fees stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) Pet. 6-17.[2]

The petitioners justify this abstract approach by attributing an equally abstract position to the court of appeals, *viz.*, that because this case involves only a temporary loss by the petitioners of the use of a limited sum of money, injunctive relief is *per se* inappropriate. Pet. 12-13.

The petitioners' effort to create an issue worthy of this Court's consideration, where none exists, is doubly flawed:

First, the court of appeals adapted no such *per se* rule regarding the propriety of preliminary relief in *Hudson* cases. "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in

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cross-motions for summary judgment on the merits in the district court. Thereafter, on August 10, 1989, after the *certiorari* petition was filed, the district court issued an opinion concluding that in most respects there are no disputed issues of material fact and that in these respects Council 13's fair share fee notice and procedures satisfy *Hudson*'s requirements. The district court has, in addition, scheduled a trial for August 24 on the single issue "whether the expense figures for AFSCME International have been verified by an independent auditor."

We are lodging copies of the district court's August 10, 1989 opinion with the Clerk of this Court.

[2] Very briefly stated, *Hudson*, as both of the courts below note, Pet. App. 8a & 21a, enunciated three requirements for the collection of agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.

the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Both of the courts below applied this standard in determining that the preliminary injunction sought by the petitioners should not issue. Pet. App. 7a & 19a.

Second, the district court after a full preliminary injunction hearing held that the petitioners had *failed* to show any *Hudson* violation here. (As we have noted, *supra*, pp. 4-5 n.1, the district court has confirmed this preliminary finding in most respects in a summary judgment ruling that, aside from one limited issue which has been set for trial, Council 13's procedures do satisfy *Hudson*.) Thus even if petitioners were right in their argument that a showing of *some* violation would by itself suffice to justify preliminary relief, the courts below were correct in denying a preliminary injunction in this case.

In short, this is a case in which the law of the Commonwealth at issue is in accord with the Constitution, the lower courts reached a correct result by exercising their sound discretion according to well settled standards, and in which *certiorari* should therefore be denied.

a. The court of appeals opinion begins by noting that the pertinent facts are "set forth at length in the district court's opinion," and that "what may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." Pet. App. 4a. And the court of appeals quotes the district court's finding that "the fair share collection procedures adopted by the Union as detailed in its notice to fair share fee payers comported with the requirements set forth . . . in *Chicago Teachers Union Local No. 1 v. Hudson* . . . ." Pet. App. 7a.

It is in this context—*viz.*, a context in which the plaintiff has failed to convince a district court that there is any *Hudson* violation—that the court of appeals observed that Council 13's decision to escrow "the entire

amount of all fair share fees deducted, from non-challengers as well as challengers, until disposition of the challenges by an impartial arbitrator," provides such a significant safeguard to the fee payers' interests that no irreparable injury has been shown. Pet. App. 8a-9a.[3]

Given the substantial protections afforded fee payers by Council 13's objection procedures—which provide an advance reduction, a detiled notice and expedited arbitration, *see* pp. 2-3, *supra*—the court of appeals' determination that the Council's further action in escrowing *all* fair share fees pending arbitration fully protects fee payers against irreparable harm while this litigation proceeds cannot be faulted.

b. The petitioners' basic underlying complaint is that Council 13 failed to fully meet the requirements established in *Chicago Teachers Union v. Hudson*, *supra*, in one limited respect, *viz.*, that the Council's notice reflects an allegedly improper fee calculation and thus the notice must be deemed to be inadequate. Pet. 20-22.[4]

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[3] The court of appeals states that its decision is "not intended to intimate any opinion regarding the ultimate merits of plaintiffs' case," Pet. App. 12a n.7, but this does nothing more than invoke the familiar rule that "it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 452 U.S. 390, 395 (1981).

[4] The petitioners also maintain that Council 13's notice should have been mailed 45 days before deductions began, or, alternatively that the Union should have held all fair share fees in escrow until the 45 day objection period had run. Pet. 18-20. In the court below, these two points were treated separately, and both were rejected because the district court found that Council 13 would not actually receive the fees deducted in August 1988 until the end of September. That being so, the court found that "the Union will not have access to the fair share fees until after the 45-day period for objecting has expired." Pet. App. 30a. Since the August deductions have already occurred, this part of the controversy is moot for present purposes.

The district court concluded that the petitioners were unlikely to prevail on the merits of this claim because Council 13's notice does provide an explanation of the basis on which the Council calculated the fee that is more than sufficient to enable fee payers to determine whether there is a basis for challenging the fee:

> [T]he purpose of the notice is to enable dissatisfied non-union members to form a basis for their objections to the amount of their fair share fees. The notice here is adequate for that purpose and whether it is in fact accurate is irrelevant to that determination. [Pet. App. 27a.]

The district court held that "substantive challenges to the amount of the fee . . . are more properly considered by the impartial decisionmaker . . ." Pet. App. 30a.

The district court based its understanding of the "purpose of the notice" on this Court's explanation in *Hudson* that "potential objectors be given sufficient information to gauge the propriety of the union's fee." Pet. App. 23a, quoting *Chicago Teachers Union v. Hudson*, *supra*, 475 U.S. at 306.

The Seventh Circuit has recently reached the same conclusion in approving a virtually identical notice sent to fee payers by another AFSCME Council. *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989). That court described the AFSCME notice and explained the basis for sustaining that notice under *Hudson* in terms that echo the opinions below:

> The notice indicates which activities the union considers to be wholly or partly in pursuit of its agency mission, and what percentage of each expenditure item is allocated to that mission. This should be enough information . . . to allow the employee to decide whether there is any reason to mount a challenge. [875 F.2d at 1316.]

Indeed, the petition itself, which repeatedly frames the petitioners' objections in terms of both the "calculation

and notice," Pet. 20, demonstrates that the notice provides sufficient information to permit fee payers to frame challenges to the calculation of the fee. *See also* Pet. 21 ("the notice and calculation are inadequate"), and *id.* ("the notice and procedures incorporate arbitrary and overbroad standards for chargeable costs").

The petitioners, in other words, have failed to identify any sound basis for questioning the conclusion of the courts below that Council 13 fully met the *Hudson* requirements. That being so the courts below were correct in denying the petitioners preliminary relief.

c. Contrary to petitioners' assertion, there is no conflict between the decisions below and the decisions in *Lowary v. Lexington Local Bd. of Ed.*, 854 F.2d 131 (6th Cir. 1988), and *Gibney v. Toledo Bd. of Ed.*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988).

In *Lowary*, the Sixth Circuit held that a preliminary injunction should issue against the collection of an agency fee equal to full union dues based on the district court's finding that " 'the defendant union's failure to comply even minimally with the notice procedural safeguard outlined in *Hudson* makes it appear likely that the unions will be found to have violated the plaintiffs' First Amendment rights,' . . ." *Lowary v. Lexington Local Bd. of Ed.*, *supra*, 854 F.2d at 133. In the instant case, by contrast, Council 13's fair share fee is less than normal union dues, and the district court found that Council 13's procedures *do comply with Hudson*, a finding which the petitioners contest in only one limited respect.

In *Gibney*, the Ohio Supreme Court approved a final judgment enjoining the collection of fees based on the trial court's uncontested finding, after trial, that the union defendant's "procedures for refunds and rebate disputes were unconstitutional." *Gibney v. Toledo Bd. of Ed.*, *supra*, 532 N.E.2d at 1302. The preliminary injunction in *Gibney* did *not* bar collection of fees, but

ordered an escrow of the fees being collected pending final judgment. *Id.*, at 1302.

(d) We have emphasized that this is a case in which the district court found that Council 13 met the *Hudson* requirements and in which petitioners have shown nothing to the contrary. That being so, we have indulged petitioners' supposition—which has no relevance here—that a preliminary injunction against the collection of agency fees is required where a court finds there is substantial, but not complete, compliance with the *Hudson* requirements, and where the union escrows 100% of the fees pending arbitration of any challenge to the fee. In what may be an excess of caution, we conclude by showing the petitioner's position in this regard is contrary to this Court's precedents regarding the appropriate relief in agency fee cases. *See* Pet. App. 11a-12a.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), on which the court of appeals relied, this Court considered a Michigan statute that had been authoritatively construed to allow unions to apply an objector's fee payments to the financing of partisan political activity. *Id.* at 232-233. Nevertheless, the Court held that the state court was correct in denying broad injunctive relief, *id.*, at 240-241, reiterating the point made in *Machinists v. Street*, 367 U.S. 740, 771 (1961), that "[s]ince . . . [*Railway Employes' Dept. v.*] *Hanson* [, 351 U.S. 225 (1956),] had established that the union-shop agreement was not unlawful as such, . . . to enjoin enforcement would '[sweep] too broadly.'" *Id.* at 238.[5]

As *Abood* shows, the "objective" of "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability

[5] Justice Stevens' concurring opinion in *Abood*, 431 U.S. at 244, and footnote 22 to *Hudson*, 475 U.S. at 309 n.22, which petitioners cite as limiting *Abood*'s remedial holding, address what might be appropriate in terms of *final* injunctive relief upon the finding of a violation *after* a trial on the merits.

to require every employee to contribute to the cost of collective bargaining activities," cuts against the broad preliminary injunctive relief the petitioners seek in this case. *See Chicago Teachers Union v. Hudson, supra*, 475 U.S. at 302, quoting *Abood v. Detroit Board of Education, supra*, 431 U.S. at 237.[6] Thus, as the court of appeals said, the denial of preliminary relief here "conforms with Supreme Court precedent [in] fair share/agency fee [cases] . . ." Pet. App. 11a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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[6] *Elrod v. Burns*, 427 U.S. 347 (1976), on which the petitioners place principal reliance, does not conflict with *Abood*'s discussion of remedies. As the *Abood* opinion explains, the preliminary injunction in *Elrod* was issued to "prohibit a State from compelling any individual . . . to associate with a political party as a condition of remaining in public employment." 431 U.S. at 235 (citations omitted). The Court expressly held that the excess charge imposed on the *Abood* plaintiffs did not result in the sort of direct infringement of First Amendment rights that justified the preliminary injunction in *Elrod*. *Id.*, at 232-233 & 238.